No. 46963-4-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

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ROLFE GODFREY and KRISTINE GODFREY, husband and wife and their marital community composed thereof,

Appellants,

v.

STE. MICHELLE WINE ESTATES LTD. dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Respondents,

and

ROBERT KORNFELD,

Additional Appellant.

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# BRIEF OF RESPONDENTS

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## INTRODUCTION

A little over a month before trial, plaintiff Rolfe Godfrey listed for trial nearly 16,000 pages of documents, including *the entire discovery productions* from his employer, and from defendants/respondents Ste. Michelle Wine Estates, Ltd., and Saint-Gobain Containers, Inc. (collectively Ste. Michelle). Nearly 12,000 pages of this was in three exhibits containing hundreds of unspecified documents. Godfrey continued his Perry Mason-style tactics of trial by surprise, despite objections, right up to and during the trial. Godfrey willfully and deliberately violated a specific local rule, and a very specific court order to obey that specific local rule.

The trial court attempted to alleviate the massive prejudice to Ste. Michelle by excluding the undifferentiated exhibits. Yet Godfrey asks this Court to set aside a bench trial involving 16 witnesses testifying over 12 court days, including three full days from Godfrey's expert witnesses on the liability issues. The trial court entered detailed findings and conclusions (Appendix A) finding Godfrey's liability experts unpersuasive. Those unchallenged findings independently vindicate the judgment.

Godfrey's other claims are equally meritless. This Court should affirm.

## STATEMENT OF THE CASE

After hearing from 16 witnesses over 12 trial days, the trial court entered unchallenged findings and conclusions regarding the underlying merits. CP 688-702 (copy attached as Appendix A). Unchallenged findings are verities on appeal. ***McCleary v. State***, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (citing ***In re Estate of Jones***, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (citing ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994))). The findings are summarized here, with record cites, for the Court's convenience.

### A. Plaintiff Rolfe Godfrey damaged the neck of the wine bottle he was opening with his corkscrew, breaking the glass, and injuring his hand, but he can still work.

At around 7:30 pm on February 13, 2010, a glass wine bottle broke while Godfrey was opening it with a corkscrew, more formally known as a single-lever wine key. CP 690; RP 1143. This resulted in a laceration of Godfrey's left thumb. CP 690; RP 1150.

Contrary to Godfrey's repeated assertions, he is fully capable of earning a living as good as or better than he made before the accident. *See* BA 1, 5-6. Of course, the trial court found for Ste. Michelle on liability, so it did not enter any findings concerning damages. CP 693, 696. But the point here is simply to counter Godfrey's hyperbole about the impact of his injury.

Since his injury, Godfrey is doing sedentary work on a part time basis at H&R Block. RP 599, 661. Godfrey's earnings are comparable to five years earlier. RP 661-62. His treating physician testified that Godfrey could work full time in an accounting-type position, with modifications. RP 710-12, 782. Demand for clerks in bookkeeping, accounting, and auditing, is growing. RP 1337-38, 1340-41. The average annual total openings in Pierce County alone are 115. RP 1341. Godfrey has the necessary education for these positions. RP 1338. The median annual wage is roughly $40,000. *Id.* at 1338-39. Prior to his injury, Godfrey was earning in the $30,000 per-year range. RP 1342.

Godfrey has sometimes worked full time since the injury. RP 1361-62. Between his two positions (Olive Garden and tax-preparing) he actually worked more than 40 hours some weeks, and 40 hours through the first quarter of 2013; he has demonstrated the ability to work full-time. RP 1362. Godfrey admits he "may have" worked more than full time between his two jobs during the 2013 tax season. RP 1566-67. It also "possible" that he worked for more than seven hours on some shifts at Olive Garden. RP 1567-70; *see also* Ex 586 (confirming that he did work such shifts).

### B. The trial court denied Godfrey's affidavit of prejudice as untimely because it had previously ruled on two motions, entering orders, and continuing deadlines.

This case was reassigned to Judge Katherine Stolz on December 19, 2013. CP 157. On January 6, 2014, Judge Stolz signed an order pursuant to a stipulation to extend the deadline both for the defendants' witness disclosures and for all rebuttal witness disclosures. CP 158-59. On January 7, 2014, Commissioner Lindsey signed an order pursuant to a stipulation requiring the plaintiff to undergo a CR 35 examination. CP 160-63. Both of these orders were directed to Judge Stolz. CP 158, 160 (top right-hand corner).

On February 27, 2014, Godfrey filed a motion to continue the July 7, 2014 trial date "to mid-May or into June 2015." CP 165. Godfrey essentially argued that discovery was not complete, even though the discovery cutoff was about two weeks away (March 10, 2014). CP 165-79, 250. Ste. Michelle did not oppose a one or two month continuance (placing the trial in August or September) but did object to a nearly year-long continuance. *See* CP 259-60.

Godfrey claims that he "filed an affidavit of prejudice" on March 3, 2014. BA 7 (citing CP 791-94).[1] Ste. Michelle filed an

[1] The "Filed" stamp in the cited record says "January 2, 2015." CP 791.

Opposition to Motion, Affidavit & Order for Change of Judge on March 4, 2014. CP 200-01. It noted the two orders the court had signed in January, and cited pertinent cases. CP 200-01.

After hearing argument on March 7, 2014 (CP 204), the trial court denied Godfrey's motion to recuse: CP 206 ("The Court[,] having signed two orders of discretion in this case, finds that the Plaintiff['s] motion for recusal/affidavit of prejudice was not timely under ***Rinehart v. Seattle Times***, 51 Wn. App. 561"). The Court also denied Godfrey's motion to continue the trial date for nearly a year, noting the prior four-month continuance. CP 263. The Court noted that plaintiff had ample time. CP 263-64.

After hearing further argument on March 21, 2014 (CP 243) the trial court denied reconsideration on the motion to recuse. CP 244-45. But in light of Ste. Michelle's stipulation to a shorter continuance, and after noting that another experienced attorney was available to assist the plaintiff, the Court continued the July 7 trial date to September 29, 2014. CP 275, 279-81.

### C. The trial court sanctioned Godfrey for failing to comply with the local rules and a court order, where he dumped nearly 16,000 pages of documents on Ste. Michelle, and never pared it down, even after trial began.

The trial court amended its case schedule in March 2014. CP 450. It continued the discovery cutoff to June 1, 2014. *Id.* In July, it expressly ordered the parties to abide by the case-schedule deadline for the Joint Statement of Evidence ("JSE"). CP 462, 464.[2]

On August 25, Godfrey provided Ste. Michelle with his witness and exhibit lists. CP 483, 488. Godfrey's exhibit list included 54 entries, including as "exhibits" 13-15, "Documents Produced by Ste. Michelle," "Documents Produced by Saint-Gobain," and the "Darden Documents." CP 338-41. Those three "exhibits" included Ste. Michelle's entire document *production* – 7,831 pages; Saint-Gobain's entire document *production* – 1,226 pages; and *all documents* from Godfrey's employer (the "Darden Documents") –

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[2] On August 22, 2014, the court granted in part Ste. Michelle's motion for summary judgment, dismissing Godfrey's claims other than construction defect. CP 304-05. Godfrey does not challenge that ruling on appeal, so it is the law of the case. *See, e.g.*, ***Augerson v. Seattle Elec. Co.***, 73 Wash. 529, 531, 132 P. 222 (1913) ("As the plaintiff has not appealed, that portion of the order . . . has become the law of the case and cannot be reviewed").

2,599 pages. CP 339. These three "exhibits" include many "hundreds of distinct documents," totaling 11,656 pages. CP 316-17.[3]

The next day, Godfrey emailed Ste. Michelle a draft JSE, including "the very same list [Godfrey] supplied in his Witness & Exhibit List on August 25." CP 483; 490. That is, the draft JSE repeated the very same three-exhibit document dump, containing hundreds of distinct, unidentified documents. CP 316-18. And the draft JSE did not include any objections. CP 490.

On August 29, Ste. Michelle filed its ER 904 disclosures. CP 306. The JSE was due the same day. CP 450. At 10:44 on August 29, Ste. Michelle emailed Godfrey its portion of the JSE, including objections to Godfrey's exhibits. CP 446, 452-53. Ste. Michelle's portion of the JSE spelled out its objection to Godfrey's identification of "Documents Produced by Ste. Michelle," "Documents Produced by Saint-Gobain," and the "Darden Documents":

> Defendants do not object to those documents produced by Ste. Michelle [Saint-Gobain or the Darden Documents] that were disclosed in Defendants' trial exhibit list.

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[3] After sanctions were entered, Godfrey admitted that the total number of pages in his original document dump was 15,948, and that "on the weekend before trial, Plaintiff chose to withdraw some documents for strategic reasons." CP 706, 746. He claims that the total number withdrawn that weekend was either 7,814 or 8,633 pages. *Id.* Either way, that still left 7- or 8- thousand pages for Ste. Michelle to deal with.

> Because Plaintiff discloses Ste. Michelle's entire document production [and Saint-Gobain's and the Darden Documents] in this case as a single exhibit, Defendants object that this exhibit improperly contains hundreds of distinct documents.
>
> Except as set forth above, Defendants object to this exhibit on the grounds of: ER 401 (Relevance) ER 403 (Cumulative) ER 404(b) (Other acts) ER 802 (Hearsay).

CP 316-18.[4] Godfrey did not respond to Ste. Michelle regarding the JSE, or file it. CP 446-47.

Following the holiday weekend, Ste. Michelle learned for the first time that Godfrey had not filed the JSE. CP 446-47, 452. Ste. Michelle asked Godfrey to explain why, stating that it would file its portion of the JSE if it did not hear back from Godfrey by 10:00 a.m. CP 452. Receiving no response, Ste. Michelle filed its portion of the JSE on September 2. CP 314, 446-47, 494. Again, Ste. Michelle's portion of the JSE stated its objection to Godfrey's identification of "Documents Produced by Ste. Michelle," "Documents Produced by Saint-Gobain," and "Darden Documents." CP 316-18.

The next day, September 3, Godfrey acknowledged that he still had "a lot of work to do on the [JSE,]" and said he would "likely be working on it up until the time of trial." CP 452. On September 4,

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[4] Ste. Michelle did not object to the Darden Documents under ER 404(b) or "Other acts." CP 318.

Godfrey filed his witness and exhibit list and ER 904 disclosure. CP 337-41, 342-49. Again, both documents include the same dump of hundreds of distinct documents produced by Ste. Michelle, Saint-Gobain, and Darden. CP 337-41, 342-49.

Ste. Michelle received Godfrey's ER 904 objections on September 12, though Godfrey did not file them until September 16. CP 350, 447. Still without a JSE from Godfrey and only a week before trial, Ste. Michelle included in its trial brief a request for sanctions based on Godfrey's failure to file a JSE. CP 425-26.

On September 25 (two working days before trial) Godfrey filed a supplemental exhibit list, only to withdraw it the next day. CP 447, 458, 484, 506. On September 26, Ste. Michelle moved for sanctions based on Godfrey's failure to file a JSE. CP 437. Godfrey responded on September 29, the first day of trial. CP 450, 466; RP 10.

When the court heard argument on Ste. Michelle's sanctions motion on September 29, Godfrey still had not made objections to any exhibits in Ste. Michelle's JSE. RP 77-86. Explaining that the purpose of case deadlines and the JSE in particular is to "pare down" before trial, the court ruled that Godfrey could not offer into evidence any exhibits Ste. Michelle had timely objected to, or object to Ste. Michelle's timely disclosed exhibits. RP 84-85.

The next day, Godfrey filed a JSE, continuing to identify for use all documents produced by Ste. Michelle, Saint-Gobain, and Darden. CP 527, 529-31. The trial court entered an order sanctioning Godfrey on October 8, 2014. CP 587-88.

### D. This was a battle of the experts that both parties called, and the trial court entered unchallenged findings and conclusions that Ste. Michelle was persuasive and credible, while Godfrey was unpersuasive on the lynchpin of his case theory.

Ste. Michelle called Rick Bayer, a glass technology specialist with American Glass Research. CP 692; 10/15 RP 59. Bayer worked in the glass-container industry for over 40 years and has been conducting glass-fracture analyses since 1976. CP 692; 10/15 RP 60, 72. Bayer testified that the remaining portion of the bottle exhibited a classic "J" fracture pattern. CP 692; 10/15 RP 91-92, 113-14. This pattern occurs when a corked bottle is fractured at or near the top of the bottle, with the fracture originating within the zone of the circumferential tension stress caused by cork pressure. CP 692; 10/15 RP 91-92. The J fracture starts and finishes at the same time damage giving rise to the fracture occurs. CP 692; 10/15 RP 94-95.

Using a microscope, Bayer examined the surface fracture on the preserved portion of the bottle, observing ripple marks indicating the fracture originated inside the top of the bottle. CP 692; 10/15 RP

95-96, 104. Bayer had examined approximately 15-18 other J fractures like this, and in each case the cause was contact damage with the corkscrew. CP 692; 10/16 RP 1316-17. Godfrey's two experts never controverted this testimony. CP 692.

Based on Bayer's examination, knowledge, and experience, the bottle broke from contact damage with a corkscrew. CP 692, 693; 10/15 10/15 RP 114-15. Bayer was 100% confident in his opinion. 10/15 RP 115. The trial court expressly found Bayer's opinion credible and persuasive. CP 692, 693.

The trial court also found that Godfrey's own testimony supported Bayer's conclusion in several ways. CP 692-93. Godfrey testified that he removed the foil and inspected the bottle for chips, cracks, or imperfections, before inserting the corkscrew. CP 692-93; RP 1144-47. He also testified that he had successfully extracted the cork one-third to one-half way out before it broke. CP 693; RP 1219. Godfrey also testified that the bottle broke into a number of smaller pieces. *Id.* All of this is consistent with the J-fracture pattern Bayer discovered. CP 693; 10/15 RP 104-07.

The trial court expressly found that neither of Godfrey's experts contradicted Bayer's analysis of the J-fracture pattern or of the ripple marks (showing the fracture started from inside the bottle).

CP 692; *see also* (William C. Hamlin): RP 137-153, 173-227, 323-82, 1574-98; (Eric Heiberg): RP 403-521, 531-89. Rather, Godfrey's primary theory was that the bottle must have had a construction defect when it left Ste. Michelle's control. CP 693; RP 1605-15.

But the trial court found that Godfrey's evidence just invited the court to speculate. CP 693. Godfrey's expert, Eric Heiberg, was a professional engineer, but his primary experience was with flat glass, not container glass. RP 423-26, 432-36, 438-49; CP 691. Godfrey admitted that Heiberg is "not an expert in glass fracture analysis." RP 432-33, 453.

Heiberg admitted that neither measurement he made on the subject bottle ("out of round" and "rocker bottom") exceeded the manufacturer's specifications. CP 691; RP 488, 543-44. Yet he claimed that if the two variances precisely aligned, causing the bottle to lean, then the bottle could have been damaged on the bottling line, causing a defect that was not visible when Godfrey inspected the bottle, but nonetheless caused the bottle to fracture upon opening six months after it left Ste. Michelle's control. CP 691; 10/2 RP 490; 1605-15; BA 34-35 (admitting Godfrey's case theory).

The trial court expressly found Heiberg's opinion unpersuasive. CP 691. First, as noted above, he is not an expert on

container glass. *Id.* Second, he did not use accepted industry standards to measure the bottle, taking extremely fine measurements on a wooden table, rather than on a calibrated metal-surface plate like Bayer used. *Id.*; *see also* 10/15 RP 112; RP 545. Third, Ste. Michelle's experts persuasively testified that even if Heiberg's measurements had been accurate, it is highly unlikely that his two measurements ("out of round" and "rocker bottom") would coincide, and equally likely that they would cancel each other out. CP 691-92; RP 1486. Fourth, they were also persuasive that if any defect weakened the glass in the top of the bottle before it left Ste. Michelle, the stress from the cork would have broken it long before it reached Godfrey sixth months later. CP 690, 692; RP 1316, 1321.

The trial court expressly found Godfrey's experts "not persuasive," but Bayer's "glass fracture analysis was credible and persuasive," and "on a more probable than not basis, the cause of breakage was contact damage with a corkscrew." CP 695. This is amply supported by the findings and trial testimony cited above. *See, e.g.*, 10/15 RP 59-137; RP 1276-1323 (Bayer's expert testimony).[5]

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[5] Godfrey also sought, and the trial court rejected, the unprecedented application of the "consumer expectations test" in this design defect case. CP 694-95. This unappealed ruling is also the law of the case.

## ARGUMENT

### A. This Court should affirm the judgment in Ste. Michelle's favor based on the trial court's unchallenged findings and conclusions.

This Court should affirm. As fully set forth in the Statement of the Case, the trial court heard 12 days of expert and other testimony, including a full airing of Godfrey's strained case theory. The court found Ste. Michelle's expert persuasive and credible, and Godfrey's experts unpersuasive. Godfrey failed to prove that a defect existed. The detailed findings and conclusions are unchallenged here. They are independently sufficient to support the judgment.

While Godfrey claims that the trial court's evidentiary rulings prevented him from receiving a fair trial, the trier of fact simply did not accept his theory of a bottle defect, but instead ruled the fracture began inside the bottle due to contact damage from his corkscrew. Those conclusions are the unchallenged law of the case. Godfrey cannot win on remand. The Court should affirm on this independently sufficient ground. *See, e.g.*, ***LK Operating, LLC v. Collection Grp., LLC***, 181 Wn.2d 48, 73, 331 P.3d 1147 (2014) (court may affirm on any ground supported by the record) (citing ***Otis Hous. Ass'n v. Ha***, 165 Wn.2d 582, 587, 201 P.3d 309 (2009)).

## B. The trial court did not err in rejecting the affidavit of prejudice as untimely because it had signed two discretionary orders before the plaintiff filed the affidavit.

The trial court denied Godfrey's motion and affidavit of prejudice as untimely because it had made two discretionary rulings before he filed his motion. Statement of the Case, *supra*, § B. Godfrey argues (a) that the trial court's order extending the deadline for witness disclosures was not a discretionary decision because it was just calendaring the parties stipulated to; and (b) that the trial judge did not physically sign the CR 35 order, so she did not exercise discretion on that order either. BA 16-24. Neither argument is correct.

As relevant here, an attorney may establish judicial prejudice under RCW 4.12.050(1) by filing a motion and affidavit of prejudice,

> PROVIDED, That such motion and affidavit is filed and called to the attention of the judge **before he or she shall have made any ruling whatsoever in the case**, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, ***and*** **before the judge presiding has made any order or ruling involving discretion**, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso . . . . [Emphases added.]

This proviso is quite broad ("any ruling whatsoever . . . and . . . any order or ruling involving discretion").

### 1. Entering orders amending the case schedule requires an exercise of discretion.

Godfrey first argues that a "court does not exercise discretion within the meaning of RCW 4.12.050 in accepting stipulated orders on preliminary matters." BA 19. But "judges are more than potted plants in the corner of the courtroom." ***State v. Ollivier***, 178 Wn.2d 813, 860, 312 P.3d 1 (2013) (Chambers, J., dissenting). And while their orders are not etched in stone, they also are not drawn on an Etch-a-Sketch so that the parties may erase and redraw them at will. Rather, only the court may amend its orders. CR 60 ("On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a[n] . . . order . . .").

A trial court enters scheduling ***orders***. *See, e.g.*, CP 246, 303.[6] Although the parties had agreed to ask the court to alter its schedule, they still sought an ***order*** actually amending it. *See, e.g.* CP 158-59. Indeed, Godfrey stipulated that because the court did not amend the discovery cutoff in the existing Scheduling Order, it remained April 21, 2014, and because the court did not amend the

[6] Godfrey did not designate the Order Amending Case Schedule dated June 7, 2013, which sets the case schedule relevant here. Ste. Michelle is supplementing the CPs with that order, attached as Appendix B.

expert witness disclosure deadline, it remained April 30, 2014, even after the court continued the trial to September 29, 2014. CP 301.

Case-management rulings are reviewed for an abuse of ***discretion***. *See, e.g.*, ***Willapa Trading Co. v. Muscanto, Inc.***, 45 Wn. App. 779, 785, 727 P.2d 687 (1986) ("a party does not have an absolute right to a continuance, and the granting or denial of a motion for a continuance is reversible error only if the ruling was a manifest abuse of discretion" (citing ***Martonik v. Durkan***, 23 Wn. App. 47, 596 P.2d 1054 (1979)); ***N. State Constr. Co. v. Banchero***, 63 Wn.2d 245, 386 P.2d 625 (1963) (motion for continuance addressed to the sound discretion of the court that may be disturbed only for a manifest abuse of that discretion). The judge exercised discretion.

In a similar context to the present appeal, the Supreme Court analyzed whether granting a continuance constitutes an exercise of discretion. ***In re Recall of Lindquist***, 172 Wn.2d 120, 129-31, 258 P.3d 9 (2011). ***Lindquist*** involved a recall petition against Prosecutor Mark Lindquist, whose lawyer sought a continuance due to Lindquist's vacation plans, which the trial court denied; petitioners then affidavited the judge. 172 Wn.2d at 126. The judge dismissed the affidavit as untimely, addressed the merits of the recall petition, and dismissed the petition. *Id.* at 127.

On appeal, the petitioners raised one of the arguments that Godfrey raises here: the statute says that calendaring issues are not discretionary rulings. *Compare Id.* at 130-31 *with* BA 22-24. The Supreme Court rejected that argument *(id.*, emphases added):

> Petitioners [argue] that "[a]rranging the calendar or setting matters for hearing do not constitute discretionary acts under [chapter 4.12 RCW] for purposes of barring filing of an affidavit [of] prejudice."
>
> Petitioners cite ***Rhinehart v. Seattle Times Co.***, arguing that Judge Cayce used no discretion in denying the continuance because the hearing date was mandated by RCW 29A.56.140. 51 Wn. App. 561, 578, 754 P.2d 1243 (1988) ("The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court's discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party's request.").
>
> On the same page that petitioners cite, however, the ***Rhinehart*** court distinguishes preparing the calendar from granting a continuance, noting that **"[r]ulings involving the exercise of discretion include the granting of a continuance."**
>
> In the present case, Judge Cayce was required to invoke his discretion in weighing whether delaying the hearing to allow Lindquist to be present justified continuing the hearing beyond the statutory deadline. [Some cites omitted; footnotes omitted; some emphases added; paragraphing added.]

***Lindquist*** - and for that matter, ***Rinehart*** – plainly dispose of Godfrey's argument. Judge Stolz exercised her discretion in granting a continuance of the witness-disclosure deadline. Godfrey's motion and affidavit were untimely.

In arguing that no motion was involved here, just a stipulation, Godfrey emphasizes the portion of the statute that mentions motions (BA 22, quoting "before [the court] shall have made any ruling whatsoever in the case . . .") while ignoring the relevant portion:

> ***and*** before the judge presiding has made ***any order or ruling involving discretion***, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso . . . . [Emphases added.]

RCW 4.12.050(1). "The interpretation of a statute is a question of law, which is reviewed de novo." ***State v. Tarabochia***, 150 Wn.2d 59, 63, 74 P.3d 642 (2003) (citing ***Wash. Pub. Ports Ass'n v. Dep't of Revenue***, 148 Wn.2d 637, 645, 62 P.3d 462 (2003)). "If the statute's meaning is plain on its face, [the Court] must give effect to that plain meaning as an expression of legislative intent." *Id.* "An unambiguous statute should not be subjected to judicial construction." *Id.* (citing ***Fraternal Order of Eagles, Tenino Aerie v. Grand Aerie of Fraternal Order of Eagles***, 148 Wn.2d 224, 239, 59 P.3d 655 (2002)). RCW 4.12.050 is unambiguous. 150 Wn.2d at 66.

In the relevant portion quoted above, RCW 4.12.050 lists the four actions that shall not be construed as discretionary. It does not suggest that there may be others. Entering an order extending

disclosure deadlines (CP 159) is not one of the four actions listed in the statute. *Expressio unius est exclusio alterius. See, e.g.*, ***Scanlan v. Townsend***, 181 Wn.2d 838, 849-850, 336 P.3d 1155 (2014) (quoting ***State v. Delgado***, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) ("'Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other.'" (quoting ***In re Det. of Williams***, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)); ***Ellensburg Cement Prods., Inc. v. Kittitas County***, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) (same). Judge Stolz exercised discretion in granting the continuance of the witness disclosure deadlines. Godfrey's motion and affidavit were untimely.

Despite the unambiguous statute and the authority discussed above, Godfrey relies on the 1943 Supreme Court decision, ***State ex rel. Floe v. Studebaker***, 17 Wn.2d 8, 134 P.2d 718 (1943). BA 19. ***Floe*** concerned an original action for a writ of prohibition preventing a trial judge from proceeding in a case, but it is neither apposite, nor controlling, nor good law. It is not apposite because its procedural posture and facts are quite unique, and nothing like this case.

***Floe*** is not controlling because its statement that stipulated orders for continuance or consolidation are not discretionary – which comes in the penultimate paragraph of the opinion (***Floe***, 17 Wn.2d

at 17) – is *dicta*. The primary holding in the case is that, in "view of what we have stated, [*i.e.*, that the neither the court nor its clerk had authority even to place the case on the docket for trial,] the writ must issue in any event." 17 Wn.2d at 13. Since that holding disposes of the case, the subsequent statements about stipulations are unnecessary to the holding, and thus not precedential. *See, e.g.*, ***Amalgamated Transit Union Local 587 v. State***, 142 Wn.2d 183, 262, 11 P.3d 762 (2000) (*dicta* is not precedential).

***Floe*** is not good law because (as discussed above) the statute unambiguously lists only four actions that cannot be construed as discretionary and because a long series of Washington State Supreme Court cases have since held that continuances are discretionary acts. *See, e.g.*, ***State v. Parra***, 122 Wn.2d 590, 859 P.2d 1231 (1993); ***State v. Dennison***, 115 Wn.2d 609, 620 n.10, 801 P.2d 193 (1990). In ***Parra***, the parties jointly presented an omnibus order resolving 23 potential defense motions and 20 potential state motions. 122 Wn.2d at 591. The parties did not object to each other's motions, and the court signed the order. *Id.* at 591-92. The defendant later filed a motion and affidavit of prejudice. *Id.* at 592-93.

The Supreme Court held the omnibus order discretionary. *Id.* at 594. It also distinguished ***Floe***: that agreement was not the same

as the omnibus order because, "by bringing their respective issues before the judge in the form of motions, the parties were submitting those matters to the court for resolution." ***Parra***, 122 Wn.2d at 594. Generally, the trial court does not exercise discretion for purposes of an affidavit of prejudice when entering agreed orders or stipulations on "matters relating merely to the conduct of a pending proceeding, or to the designation of the issues involved, affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court." *Id.* at 603.

But seeking to *amend* a Case Scheduling Order invokes those duties and functions. All trial courts are concerned with the timely disposition of cases and the court's own calendar, even if civil cases do not present the same due process issues as criminal cases. Godfrey's and Ste. Michelle's stipulation made clear that they had agreed to continue the disclosure deadlines, but that is not an issue "affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court." ***Parra***, 122 Wn.2d at 603. Judge Stolz exercised her discretion in determining whether to sign the order or hold the parties to the existing schedule. Godfrey's affidavit was untimely.

### 2. The Commissioner's order granting a CR 35 examination was a discretionary decision by the presiding judge, Judge Stolz.

In a footnote, Godfrey suggests that Judge Stolz could not rely on her Commissioner's ex parte order regarding a CR 35 examination. BA 16 n.6. But that discretionary order had become the order of the court after Judge Stolz was assigned to the case. It was a discretionary ruling. Godfrey's affidavit was doubly untimely.

Our Constitution grants court commissioners broad powers:

> There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

WASH. CONST. ART. IV, § 23. The Legislature may not limit the courts' constitutional powers. ***State ex rel. Henderson v. Woods***, 72 Wn. App. 544, 549, 865 P.2d 33 (1994). The "duties as a judge of the superior court at chambers" include "'matters not requiring a trial by jury.'" ***State v. Goss***, 78 Wn. App. 58, 60-61, 895 P.2d 861 (1995) (commissioner authorized to issue search warrant) (cites omitted); ***State v. Karas***, 108 Wn. App. 692, 701-02, 32 P.3d 1016 (2001) (commissioner authorized to issue a permanent protection order).

Under RCW 2.24.040, a "court commissioner shall have power, authority, and jurisdiction, concurrent with the superior court and the judge thereof . . . (9) To hear and determine ex parte and uncontested civil matters of any nature." Granting a CR 35 examination is discretionary. ***Tietjen v. Dep't of Labor & Indus.***, 13 Wn. App. 86, 91, 534 P.2d 151 (1975) (rulings on motions for CR 35 examinations are reviewed for abuse of discretion). The Commissioner thus had discretion to enter the CR 35 exam order.

Under RCW 2.24.050, all "acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court," "and unless a demand for revision is made within ten days from the entry of the order . . . of the court commissioner, the orders . . . shall be and become the orders . . . of the superior court." Godfrey did not move to revise the Commissioner's order regarding the CR 35 Examination. It was thus the presiding judge's order.

Godfrey thus did not file his motion and affidavit "before the judge presiding has made any order or ruling involving discretion," RCW 4.12.050. The court had made two discretionary decisions. Godfrey's affidavit was untimely.

### 3. The parties sought an *order* for a CR 35 exam, rather than simply having an exam by agreement.

Godfrey briefly alludes to CR 35(c)'s provision for an "Examination by Agreement." BA 21. But this was not such an examination – otherwise, the parties would simply have had an agreement and an exam. Rather, the parties stipulated to an "*Order* for a CR 35 examination by all defendants." CP 160. And the Commissioner signed an "**ORDER**" that Godfrey: "shall submit to an examination, as contemplated by CR 35, subject to the conditions set forth in the Stipulation. IT IS SO ORDERED." This was not an examination by agreement.

That is a difference that makes a difference: CR 35(a)(1) expressly makes such an order discretionary:

> . . . the court in which the action is pending ***may*** order the party to submit to a physical examination by a physician. . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. [Emphasis added.]

The parties' stipulation simply fulfilled the requirements of the second sentence above. CP 160-62. But CR 35 expressly rendered the order discretionary, so the court exercised its discretion before Godfrey filed his affidavit and motion. No error occurred.

### C. The trial court properly exercised its discretion to exclude certain exhibits, where Godfrey disclosed his intent to rely on nearly 12,000 pages of unidentified exhibits without ever filing a JSE – or anything else – paring down his disclosure.

#### 1. Standard of review.

This Court will reverse an order sanctioning a party for violating a local case scheduling rule, or the court's case scheduling order, only where the trial court has abused its broad discretion. ***Allied Fin. Servs. v. Magnum***, 72 Wn. App. 164, 168-69 n.4, 864 P.2d 1, 821 P.2d 1075 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. ***Mayer v. Sto Indus., Inc.***, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

#### 2. Godfrey has failed to provide an adequate record on review.

As an initial matter, Godfrey has not presented an adequate record to establish that he was prejudiced by the trial court's rulings excluding these documents. As the appellant, Godfrey bore the burden to provide a sufficient record on review. *See, e.g.*, ***Reed v. Pennwalt Corp.***, 93 Wn.2d 5, 6-7, 604 P.2d 164 (1979) (appeal dismissed for inadequate record); ***Stevens County v. Loon Lake Prop. Owners Ass'n***, 146 Wn. App. 124, 131, 187 P.3d 846 (2008)

(if appellant fails to produce adequate record for review, trial court's decision must stand).

Godfrey has not designated the three "exhibits" containing the nearly 12,000 pages that were covered by the ruling, so this Court cannot examine those documents to determine whether any portion of them would have made any difference here. Indeed, Godfrey has not explained why any specific document was necessary to prove his case. Since those arguments have not been made, Ste. Michelle cannot respond to them. The Court should not permit Godfrey to sandbag Ste. Michelle (again) by designating them and raising arguments for the first time in reply. *See, e.g.*, ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issues first raised in reply are too late).

**3. Godfrey violated Pierce County Local Rules governing the case schedule, and the court's order requiring compliance with the JSE rules. (BA 28-31).**

Godfrey failed to timely file a JSE, despite the local rule, the case scheduling order, and the court's express reminder to follow the JSE rule. CP 246, 464. The purpose of the JSE is to pare down witnesses, exhibits, and objections to exhibits before trial, so that the trial is not a "guessing game." RP 84, 85, 162-63. Godfrey's noncompliance was no administrative trifle – every case-scheduling

document he provided included a nearly 16,000-page document dump, nearly 12,000 pages of which was hundreds upon hundreds of unidentified exhibits. Godfrey's noncompliance is obvious.

In cases governed by a case schedule, "the parties shall file a Joint Statement of the Evidence containing (A) a list of the witnesses whom each party expects to call at trial and (B) a list of the exhibits that each party expects to offer at trial." Pierce County Local Rule ("PCLR") 16(b)(4). The JSE must note whether the parties agree on each exhibit's authenticity and admissibility. *Id.*

PCLR 3 expressly authorizes the trial court to "impose sanctions or terms for failure to comply with the Order Setting Case Schedule." PCLR 3(k). When an attorney fails to comply with the Order Setting Case Schedule without "reasonable excuse," the trial court may impose monetary sanctions payable to the court, or "terms" (costs and attorney fees) payable to the opposing party. PCLR 3(k). "[T]he court may [also] impose such other sanctions as justice requires." *Id.* "[O]ther sanctions includes but is not limited to the exclusion of evidence." *Id.*

Under the amended case schedule, trial was set for September 29, 2014, and the parties were to file a JSE on August 29. CP 450. On July 10, more than one month before the JSE was

due, the court entered a pretrial order reminding counsel that the "Court expects Counsel to abide by the case schedule deadline for filing of the Joint Statement of Evidence." CP 462, 464.

As detailed above, Godfrey did not file a JSE on Friday, August 29, despite receiving Ste. Michelle's additions to the incomplete draft JSE Godfrey had prepared. CP 446-47, 452. Ste. Michelle included all required information in the draft: the witnesses Ste. Michelle intended to call, the exhibits it intended to offer, and its objections to Godfrey's exhibits. CP 314-36. Upon learning that Godfrey had not timely filed a JSE on the 29th, Ste. Michelle filed this draft the next court day, Tuesday, September 2. CP 314, 452. On September 3, Godfrey confirmed that he had not timely filed a JSE, informing Ste. Michelle that he still had "a lot of work to do on the" JSE, and did not anticipate filing one before trial. CP 452.

Godfrey's argument that he did not have to file a "separate" JSE misses the mark. BA 28. Godfrey complains that the JSE Ste. Michelle filed included Godfrey's exhibits, so "satisfied the court's orders and the local rule." *Id.* But the local rule provides that the JSE must include both parties' witnesses, exhibits, and objections to exhibits. PCLR 16(b)(4). While Ste. Michelle's JSE includes all this required information as to Ste. Michelle, it does not include Godfrey's

intended witnesses or objections. CP 314-36. Thus, it plainly does not satisfy PCLR 16 as to Godfrey. BA 28.

Godfrey argues that PCLR 16(b)(4) governing JSEs, contains no threat of sanctions, in "contrast" to PCLR 16(b)(2) governing the exchange of witness and exhibit lists, which provides that undisclosed witnesses and exhibits may not be used at trial, absent a showing good cause for the nondisclosure. BA 29. This "contrast," Godfrey claims, "reflect[s] the fact that the JSE is" just an "*index*." *Id.*

Godfrey's argument is plainly at odds with PCLR 3(k), expressly authorizing the trial court to exclude evidence when a party fails to comply with the case scheduling order without reasonable excuse. Thus, Godfrey is simply incorrect in suggesting that the JSE rule includes no threat of sanctions. BA 29. Noncompliance with <u>any</u> aspect of the order setting the case schedule can result in the exclusion of evidence. PCLR 3(k).

And Godfrey misunderstands the purpose of the JSE. It is not just to combine the witness lists, exhibit lists, and ER 904 disclosures in one document. CP 483. Rather, the purpose of the JSE is to pare down witnesses, exhibits, and objections to exhibits <u>before</u> trial, so that trial is not a "guessing game." RP 84, 85, 162-63. Yet Godfrey left Ste. Michelle guessing.

On August 25, Godfrey sent Ste. Michelle an exhibit list, including what purported to be three "exhibits" that were actually all of the documents produced by Ste. Michelle, Saint-Gobain, and Darden – hundreds of distinct documents totaling nearly 12,000 pages. CP 339. The JSE Ste. Michelle filed noted its objection to this document dump. CP 316-18. Godfrey never cured that error.

Godfrey's ER 904, filed on September 4, suffers the same defect, dumping thousands of pages without indicating which documents Godfrey intended to use at trial. CP 342, 344. Even Godfrey's JSE filed the day after the trial court sanctioned him, and after trial had started, has the same defect. CP 527, 529-31.

It is precisely for this reason that Godfrey's argument that he did not violate the local rules misses the point entirely. BA 28-31. Godfrey states that he "disclosed four times the evidence he would rely on at trial" before the JSE due date. BA 25. That is accurate: he repeatedly disclosed hundreds of distinct documents totaling nearly 12,000 pages. CP 316-18, 339, 344, 490. But this sort of gamesmanship does not improve with repetition. Godfrey utterly failed to comply with the local rules and the trial court's order.

**4. Godfrey's failure to narrow down its massive disclosure was willful. (BA 30-31).**

Undisputed facts contradict Godfrey's claim that his failure to timely file a JSE was not willful. BA 30-31. The court may exclude evidence for noncompliance absent a "reasonable excuse." PCLR 3(k). Noncompliance "is deemed willful" if it is "without reasonable excuse or justification." ***Magana v. Hyundai Motor Am.***, 167 Wn.2d 570, 584, 220 P.3d 191 (2009). It is undisputed that Godfrey did not file a JSE when it was due on August 29, admitting days later that he "still [had] a lot of work to do" and did not plan on filing until trial. CP 452. That was willful.

Godfrey's principal argument is that lead counsel was "incapacitated," but that red herring does not explain Godfrey's noncompliance. BA 30. Godfrey omits that he had co-counsel to help him litigate the case as early as the affidavit of prejudice issue. CP 159 (Roxanne Eberly signs stipulation). Thereafter, she was deeply involved in the litigation. CP 191, 214, 217, 341, 452, 460, 524, 697, 159, 191, 214, 217; RP 2, 4-8. She could have filed the JSE.

Godfrey's argument is also belied by counsel's admission that he had delegated the JSE to his "seasoned paralegals." CP 471,

474. Where counsel had delegated the JSE, the failure to timely file it cannot be excused by his medical condition.

And in any event, counsel was not "incapacitated" when the JSE was due on August 29. CP 446, 450, 484. Godfrey's lead counsel had dental surgery on August 25, and had emergency surgery due to an infection on September 3. CP 484. He became "incapacitated" while battling the infection around September 3 and 4. *Id.* This does not explain the failure to timely file the JSE when it was due on August 29, or why others responsible did nothing.

And counsel was back in the office on September 9, but did not file a JSE until after trial had started. CP 484, 527. Counsel's medical condition does not explain the failure to immediately file a complete JSE upon his return to the office weeks before finally filing a still-defective JSE after trial started. *Id.*

Here too, Godfrey misses the real point: failing to file the JSE is not just about technical compliance with the rules. When Godfrey finally filed a JSE on September 30 – after trial began – Ste. Michelle had already repeatedly objected to Godfrey's three-"exhibit" document dump on the grounds that it contained hundreds of unidentified documents totaling nearly 12,000 pages. CP 316-18; RP 79, 83. As discussed above, all of Godfrey's filings suffer from this

same defect. Godfrey was on notice that Ste. Michelle was objecting, but he just kept doing the same thing. That was willful.

Finally on this point, Godfrey argues that the trial court's failure to explain willfulness in light of counsel's medical condition warrants reversal. BA 30-31. The trial court adequately explained her rationale on the record (RP 84-85):

> [D]iscovery in this case, the cutoff was back in July – or, excuse me, June. The joint statement of evidence was supposed to have been filed 08/29, and the reason you have the discovery cutoff several months in advance of the joint statement of evidence is so that during those interim months, you can all be working like beavers in a bad winter just to. . . pare these things down and get them done. . .; and granted, you may have some health issues but so does the Court; and I've pretty much been here every day. . .. I may have to take. . .recess on a case in an afternoon; but the bottom line is: I'm here. You have an office. They know what the deadlines are as well as you; and. . .they should be working towards those.

**5. Godfrey's noncompliance substantially prejudiced Ste. Michelle's ability to prepare for trial: it spent weeks after the JSE deadline unaware of Godfrey's objections, and Godfrey never narrowed his massive document dump. (BA 31-35).**

In the month preceding trial, Godfrey left Ste. Michelle guessing about Godfrey's objections, and which of nearly 16,000 pages of exhibits – the vast majority of which were unidentified – Godfrey would use at trial. That is contrary to the point of the JSE, which is to pare down and provide notice. Godfrey's trial-by-surprise tactics plainly prejudiced Ste. Michelle.

Neither the draft JSE Godfrey provided on August 26, nor the JSE Ste. Michelle filed on September 2, included Godfrey's objections to Ste. Michelle's exhibits. CP 314-36, 483, 490. So for weeks leading up to trial, Ste. Michelle had no idea what Godfrey's objections would be, or how to meet them. RP 78; CP 425, 447. That prejudiced Ste. Michelle's ability to prepare for trial and unfairly advantaged Godfrey. *Id.*

Godfrey argues that he cured that defect – and any prejudice – by serving an ER 904 with objections to Ste. Michelle's exhibits on September 12, and filing it four days later. CP 350, 362, 447, 484. That does not alleviate the two weeks Ste. Michelle was trying to prepare for trial without Godfrey's objections. Further, late-disclosing the objections created an additional prejudice: Ste. Michelle had "been scrambling ever since to try and keep up." RP 78, 159.

Godfrey next argues that Ste. Michelle initially took issue only with the undisclosed objections, arguing on the second day of trial that it was also prejudiced by the document dump. BA 33-34. Godfrey argues, then, that the document-dump had "nothing to do with" the sanction for his noncompliance. *Id.* That is false.

Ste. Michelle plainly argued on the first day of trial, when the court first addressed the motion for sanctions, that Godfrey had

included "almost every document that had been produced in this case by every party and nonparty and included them as bulk exhibits." RP 79. Counsel specifically addressed the "Ste. Michelle Documents," totaling over 7,300 pages. *Id.*; CP 339. Although Ste. Michelle referred to Godfrey's exhibit list, the same defect is on the JSE and the ER 904. *Id.*; CP 316-18, 339, 344, 529-31.

On the Saturday before trial, Godfrey finally made some effort to winnow down his exhibits, going from 25 to 12 binders. RP 79. The prejudicial effect of this document dump was plainly before the court on the first day of trial. *Id.* And the court's order on September 29 addressed the prejudice caused by the document dump (RP 84):

> We have deadlines, and you're supposed to meet those deadlines; and the deadlines are there in an effort to pare down and make things more productive. We're not shooting stuff right up until and during -- . . . as we start trial. That's not the way we work today; and . . . the case schedules and those deadlines are there, and they are upheld.

Ste. Michelle asserted the same prejudice on the second day of trial, when Godfrey continued to argue the issue:

> [I]nstead of disclosing the actual exhibits that they anticipated using for trial, they disclosed every document, nearly every document that had been produced in this case by any party, by any nonparty.

RP 159. The court again, agreed, ruling that even the pared-down document dump prejudiced Ste. Michelle's ability to prepare for trial:

> [Y]ou do handicap them by not . . . filing a joint statement of evidence which specifically says these are what we're going to use. I mean, you just can't blanket dump it out there and say, yeah, we're going to use all 7,000 of them, when you're probably not, and that's why they went to case schedules.

RP 163 (*see also* RP 166-67). And as if the court's reasoning was not already abundantly clear, she repeated it two days later (RP 473):

> [T]o simply say we've got 7,800 documents from Ste. Michelle, and we're going to admit them into evidence, there's no way Opposing Counsel could go through those documents and attempt to figure out which specific documents were actually going to be relevant to your case. It's your case.

Godfrey's argument that he had "repeatedly disclosed the specific portions of those exhibits he would rely on at trial" does not fare any better here that it did below. BA 34; RP 163. Godfrey asserts that his noncompliance could not have prejudiced Ste. Michelle because he identified some portion of the nearly 12,000-page document dump in depositions, summary judgment pleadings, summary exhibits, and in his trial brief. *Id.* But as the trial court stated, trial is not a "guessing game." RP 163.

Godfrey appears to suggest that Ste. Michelle should have gone back through the pleadings and discovery to figure out which of the 12,000 pages Godfrey had previously relied on, and then to assume that these were the only pages Godfrey would rely on at trial. BA 34. But Godfrey is required to tell Ste. Michelle which exhibits he

will rely on. RP 163. Ste. Michelle is not required to comb through pleadings, depositions, and other discovery, and just guess (*id.*):

> [B]y the time you get to trial . . . both sides need to know every piece of documentation the other side is proposing to use. It isn't supposed to be a, you know, if I guess it, you know, maybe I'm right and maybe I'm wrong. We're not down here for a guessing game.

And if Godfrey is suggesting that these are the only documents he intended to use at trial from the 12,000 pages, then his failure to simply file a JSE is was plainly tactical. BA 34. Godfrey's implicit assertion that he pared down the exhibits he would rely on long before the JSE was due is at odds with his assertion that there was still much work to be done on the JSE. *Compare* BA 34 *with* 452.

Godfrey also argues that a "separate" JSE "would have been redundant of the one Ste. Michelle had already filed." BA 31. Therein lies the problem. The JSE Ste. Michelle filed was incomplete as to Godfrey. It did not include Godfrey's objections to Ste. Michelle's exhibits as required by PCLR 16(b)(4). It did not address Ste. Michelle's objection to the document dump of hundreds of unidentified documents spanning nearly 12,000 pages. CP 316-18. Again, Godfrey never corrected that defect – his witness and exhibit list, draft JSE, ER 904, and final JSE, all included the same document dump. CP 316-18, 339, 344, 529-31.

Submitting another JSE that did not cure this defect would have indeed been "redundant." BA 31. But that begs the question. Failing to timely disclose objections to Ste. Michelle's exhibits, and never divulging which of the 12,000 pages Godfrey intended to rely on at trial, are precisely what substantially prejudiced Ste. Michelle.

Godfrey next asserts that Ste. Michelle was not prejudiced because it understood Godfrey's case theory. BA 34-35. Godfrey has to disclose objections and exhibits to prove his case. PCLR 16(b)(4). Whether Ste. Michelle understood his theory is irrelevant. BA 34-35.

Finally, Godfrey claims that if the document dump really prejudiced Ste. Michelle, it would have complained on August 25, when it received Godfrey's draft JSE. BA 35. Ste. Michelle objected in the JSE it sent Godfrey on the 29th, and many times thereafter. CP 316-18; RP 79, 83, 159. This last-ditch effort is unpersuasive.

**6. The sanction was necessary to remedy the prejudice Godfrey's willful noncompliance caused.**

The prejudice Godfrey's document dump caused to Ste. Michelle could not be alleviated by any lesser sanction than excluding the documents. When trial started, Godfrey had already seriously handicapped Ste. Michelle's ability to prepare. RP 163, 166-67, 473. Allowing Godfrey to use his unidentified and untimely

exhibits would have been trial by surprise. *Id.* It also would have gutted the sanctions order. The sanction was necessary and just.

**7. *Burnet* does not apply to the exclusion of exhibits.**

Godfrey just assumes that this matter is controlled by ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 933 P.2d 1036 (1997). BA 27-29. The three-part ***Burnet*** test applies only when the trial court imposes one of the harsher remedies, such as dismissal, default, or witness exclusion. ***Burnet*** does not apply to the admission and exclusion of exhibits at trial. This Court should affirm.

The trial court excluded exhibits Godfrey failed to properly and timely disclose, and admitted exhibits Godfrey failed to timely object to, decisions traditionally within the trial court's broad discretion. CP 587-88. The trial court did not dismiss any of Godfrey's claims, enter a default, nor exclude witnesses. *Id.* Indeed, all of Godfrey's witnesses testified, including both of his liability experts (one even testified twice). Godfrey's expert testimony lasted over five days, totaling three full days of trial. In the end, it was simply unpersuasive.

***Burnet*** and its considerable progeny are inapposite – all involve sanctions far more severe than those imposed on Godfrey. Those harsher sanctions include: limiting discovery, excluding expert testimony, and removing a claim from the case (***Burnet***); excluding

two experts and dismissing the case (***Blair***); striking a key medical expert (***Teter***); excluding multiple witnesses (***Jones***); and striking an untimely medical-expert affidavit, and dismissing the case on summary judgment (***Keck***).[7] These Supreme Court decisions do not support Godfrey's claim that a trial court excluding – or allowing – exhibits at trial must apply the ***Burnet*** test, much less enter findings.

***Burnet*** does not define "harsher remedies," holding only that the three-part test applies where a trial court limits discovery, excludes expert testimony, and removes a claim from the case 18-months before trial. 131 Wn.2d at 494 (holding that the sanction was simply "too severe in light of the length of time to trial"). That, the Court held, was "significantly more severe" than excluding witnesses disclosed shortly before trial. *Id.* at 496 (discussing ***Allied***, 72 Wn. App. at 168 (defense provided no explanation for failing to name witnesses up to the time of trial); ***Dempere v. Nelson***, 76 Wn. App. 403, 405, 886 P.2d (1994), *rev. denied*, 126 Wn.2d 1015 (1995) (excluding a witness identified 13 days before trial)).

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[7] ***Keck v. Collins***, No. 90357-3, 2015 Wash. LEXIS 1055 (Sept. 24, 2015); ***Jones v. City of Seattle***, 179 Wn.2d 322, 314 P.2d 380 (2013); ***Teter v. Deck***, 174 Wn.2d 207, 274 P.3d 336 (2012); ***Blair v. TA-Seattle E. No. 176***, 171 Wn.2d 342, 254 P.3d 797 (2011).

In ***Mayer***, the Court held that "harsher remedies" requiring a ***Burnet*** analysis include "dismissal, default, and the exclusion of testimony," but not monetary sanctions. 156 Wn.2d at 690 (quoting ***Snedigar v. Hodderson***, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *aff'd in relevant part*, 114 Wn.2d 153, 169 & n.37, 786 P.2d 781 (1989)). In ***Blair***, the Court held that harsher remedies include striking the plaintiffs' only medical experts, and later dismissing the case on the ground that they could not prove causation without that very expert testimony. 171 Wn.2d at 346-47, 352. In ***Teter***, the Court held that harsher remedies include striking plaintiffs' key medical expert, after plaintiffs were forced to replace a medical expert who suddenly withdrew. 174 Wn.2d at 212, 217.

In ***Jones***, the Court held that the trial court erred in failing to address all three ***Burnet*** factors when excluding three witnesses, but that the error was harmless, where the witnesses' testimony would have been inadmissible under the court's correct (and unchallenged) rulings *in limine*. 179 Wn.2d at 356-57. Godfrey misplaces reliance on ***Jones***, which states only that "***Burnet*** applies to witness exclusion." *Compare* BA 31 *with* ***Jones***, 179 Wn.2d at 338. ***Jones*** does not address the exclusion of exhibits. 179 Wn.2d at 338.

Finally, in ***Keck***, the Court held that ***Burnet*** applies where the trial court struck an untimely-filed medical-expert affidavit and granted summary judgment that the plaintiff lacked competent medical testimony to establish her medical negligence claim. 2015 LEXIS at *10-11. As the Court put it, "essentially, the court dismissed the plaintiff's claim because they filed their expert's affidavit late." *Id.* at *14. Trial was still several months away. *Id.* at *14-15.

None of these cases support Godfrey's argument that "***Burnett*** [*sic*] applies to **any** sanctions 'that affect a party's ability to present its case.'" BA 26 n.8 (emphasis added) (quoting ***Blair***, 171 Wn.2d at 348); *see also* ***Keck***, at *13. Indeed – every sanction affects a party's ability to present its case, including monetary sanctions, which ***Mayer*** expressly rejects as not harsh enough to invoke ***Burnet***. 156 Wn.2d at 689-90. The language Godfrey relies on is used to describe the harsh remedies of default, dismissal, and witness exclusion (often coupled with dismissal), and in no way suggests that any sanctions "that affect a party's ability to present its case" are harsh remedies subject to ***Burnet***. ***Blair***, 171 Wn.2d at 348; ***Mayer*** 156 Wn.2d at 690.

In short, the trial court's reference to Perry Mason was apt. Keeping Ste. Michelle guessing which of nearly 12,000 pages Godfrey would use was trial by surprise. The Court should affirm.

**8. Any *Burnet* error would be harmless.**

As explained above, ***Burnet*** has not been and should not be extended to the exclusion of exhibits at trial, where a party fails to timely object to exhibits and then dumps nearly 12,000 pages of unidentified documents purporting to be three "exhibits." But if this Court holds otherwise, then it should hold that the error is harmless, where the trial court was unpersuaded by Godfrey's considerable expert testimony. ***Jones***, 179 Wn.2d at 356-59.

As explained in the Statement of the Case, the trial court heard 12 days of testimony. On liability, this was essentially a battle of the experts, but the court also heard from Godfrey, from a witness to the accident, and from Ste. Michelle employees (and others) familiar with its bottling processes. RP 934-64, 967-990, 1138-57, 1535-61. Godfrey's liability experts were on the stand on five different days, giving a full three days of testimony addressing his case theory. (William C. Hamlin): RP 137-153, 172-227, 323-82, 1574-98; (Eric Heiberg): RP 403-521, 531-90. That entire theory was that "rocker bottom" and "out of round" measurements that were within

manufacturer's specifications may have combined to create an opportunity for an invisible defect that could perhaps cause the bottle to break six months later when Godfrey just happened to be opening it with a single-lever wine key corkscrew. BA 35. Unsurprisingly, the trial court rejected this untenable theory.

The exclusion of evidence that is cumulative, irrelevant, hearsay, or otherwise improper, is harmless error. *See, e.g.*, ***Thornton v. Annest***, 19 Wn. App. 174, 181, 574 P.2d 1199 (1978). Ste. Michelle timely objected on numerous grounds to whatever documents Godfrey has never properly identified. CP 315-24. But in any event, they were obviously cumulative of five days of expert testimony supporting Godfrey's untenable theory.

And equally, the admission of Ste. Michelle's exhibits was harmless where, of the 16 substantive Ste. Michelle exhibits admitted at trial, Godfrey apparently included 14 on his ER 904 disclosure, waiving any objection. CP 309-10, 328-29, 342-49, 571, 603-11, 699-702, 723; ***Hendrickson v King County***, 101 Wn. App. 258, 267-68, 2 P.3d 1006 (2000). In any event, Ste. Michelle properly disclosed its exhibits, and Godfrey just failed to object to them.

Any ***Burnet*** error would be harmless. But there was no error. This Court should affirm.

### D. The court did not exclude Godfrey's experts, but prohibited them from testifying about excluded exhibits.

Godfrey next argues that his noncompliance does not warrant the "exclusion of the opinions of Mr. Godfrey's experts." BA 38. Godfrey's liability experts presented considerable testimony over a five-day period that the court rejected as unpersuasive. CP 690-92. Excluding the exhibits does not cure the prejudice Godfrey caused if they could testify about those exhibits. ER 703 is not a tool to back-door stricken evidence. This Court should affirm the trial court's discretionary decision. ***Deep Water Brewing, LLC v. Fairway Res. Ltd.***, 152 Wn. App. 229, 271, 215 P.3d 990 (2009) (reviewing the admission of expert testimony for an abuse of discretion).

***Deep Water***, the sole case Godfrey cites, does not say that ER 703 permits experts to opine on excluded exhibits. BA 39. Indeed, Godfrey provides no apposite authority on this point. *Id.*

ER 703 permits a trial court to admit inadmissible evidence, such as hearsay, "'for the limited purpose of showing the basis of the expert's opinion.'" BA 39 (quoting 152 Wn. App. at 275). ER 703 "is intended to broaden the acceptable bases for expert opinion," recognizing that evidence not sufficiently trustworthy to go to a jury, is "nevertheless sufficiently reliable for evaluation by an expert."

***Queen City Farms, Inc. v. Central Nat'l Ins. Co.***, 126 Wn.2d 50, 102-03, 882 P.2d 703, 891 P.2d 718 (1994); ***Henderson v. Tyrrell***, 80 Wn. App. 592, 629-30, 910 P.2d 522 (1996). No case says the rule permits using experts to back-door excluded evidence.

Indeed, Godfrey omits ***Deep Water***'s statement that ER 703 "is not designed to allow a witness to 'summarize and reiterate all manner of inadmissible evidence.'" ***Deep Water***, 152 Wn. App. at 275 (quoting ***State v. Martinez***, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995) (quoting 3 DAVID LOUISELL & CHRISTOPHER NUELLER, FEDERAL EVIDENCE § 389, at 663 (1979))). Thus, ER 703 is not a means to bring inadmissible evidence in through the back door.

Correctly applied, ER 703 permits a medical opinion based in part on test results not admitted into evidence. ***De Haven v. Gant***, 42 Wn. App. 666, 672-73, 713 P.2d 149, *rev. denied*, 105 Wn.2d 1015 (1986)). It permits expert opinion based in part on a medical history that itself would be inadmissible hearsay. ***Hickok-Knight v. Wal-Mart Stores, Inc.***, 170 Wn. App. 279, 315-16, 284 P.3d 749 (2012), *rev. denied*, 176 Wn.2d 1014 (2013). And, as in ***Deep Water***, it permits expert opinion on diminished value based on another appraiser's work. 152 Wn. App. at 274-75.

It is an entirely different matter to suggest that a judge abused her discretion where the sole basis for the expert opinions was exhibits stricken as a sanction. BA 39. Godfrey's experts Hamlin and Heiberg had no expertise regarding the bottling line used at Ste. Michelle when the bottle at issue was manufactured in 2009, so they could not testify about that bottling line without relying solely on excluded maintenance records. RP 327-46, 450-54. Allowing them to do so would simply overturn the sanctions order.

But any testimony about that 2009 bottling line is irrelevant, where the court's unchallenged findings reject as unpersuasive any claims that the "out of round" and "rocker bottom" variances contributed to a bottle defect. CP 691, FF 7-8. Godfrey argues only that a "perfect storm" of combined effects caused a defect – not that the line alone independently caused a defect. BA 34-35. Since the variances were rejected by the trial court in unchallenged findings, the bottling-line testimony is just a tempest in a tea pot.

Similarly flawed was Godfrey's attempt to elicit testimony from Heiberg regarding "exemplar" testing. Heiberg could not testify about exemplar testing without summarizing and reiterating the inadmissible exhibits, which ER 703 does not permit. ***Deep Water***, 152 Wn. App. at 275. And as the trial court correctly and repeatedly

noted, permitting expert testimony on excluded exhibits would have punished Ste. Michelle for Godfrey's noncompliance. RP 458-59, 465-66, 470-71, 472-73. This argument is nothing more than an attempt to end-run the trial court's correct order on the JSE. The Court should affirm.

**E. Remand issues are not yet ripe.**

If the Court finds Godfrey's affidavit of prejudice timely, then of course he should receive a new judge on remand. *See* BA 40-42. But that should not happen for the reasons stated *supra,* Arg. § B. And if his affidavit of prejudice was untimely, Godfrey has not yet even asked this judge to recuse.

Thus, these issues are not ripe for review. In the highly unlikely event that this Court were to reverse the unchallenged findings and conclusions and remand for a new trial on the facts (presumably on a ground not articulated in Godfrey's opening brief) then there might be some possibility that Godfrey could request a jury trial on remand. But these issues are not ripe, so they should be left to the trial court to decide on remand.

On a jury trial, Godfrey cites ***Wilson v. Horsley***, 137 Wn.2d 500, 974 P.2d 316 (1999) and ***Spring v. Dep't of Labor & Indus.***, 39 Wn. App. 751, 695 P.2d 612 (1985)). BA 42. ***Wilson*** is inapposite

because it involved a mistrial in the first trial. *See, e.g.*, ***State v. Bange***, 170 Wn. App. 843, 848-53, 285 P.3d 933 (Div. II 2012), *rev. denied*, 176 Wn.2d 1030 (2013) (limiting ***Wilson*** to the mistrial situation, where the plaintiff did not receive a completed first trial). Division Three's ***Spring*** says that jury trial *may be requested* when a jury was waived, but the bench-trial verdict was remanded *to retry a fact*. 39 Wn. App. at 754-56 (following ***Tesky v. Tesky***, 110 Wis. 2d 205, 327 N.W.2d 706, 708 (1983)). But again, Godfrey has made no argument to reverse the unchallenged findings and conclusions, and for the reasons stated *supra*, Arg. § A, that should not happen. The same is true for Godfrey's argument about a new judge. It is impossible to know the outcome at this juncture.

## CONCLUSION

For the reasons stated above, this Court should affirm.

RESPECTFULLY SUBMITTED this 15th day of October, 2015.

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**CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL**

I certify that I caused to be mailed postage prepaid, via U.S. mail, and/or emailed, a copy of the foregoing **BRIEF OF RESPONDENTS** on the 21st day of October, 2015, to the following counsel of record at the following addresses:

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## APPENDICES

Appendix A — Findings of Fact and Conclusions of Law

Appendix B — Order Amending Case Schedule

RCW 2.24.040

RCW 2.24.050

RCW 4.12.050

CR 35

CR 60

Pierce County Local Rules

PCLR 3

PCLR 16

ER 703

THE HONORABLE KATHERINE M. STOLZ

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ROLFE GODFREY and KIRSTINE GODFREY, husband and wife and their marital community composed thereof,

Plaintiffs,

v.

STE. MICHELLE WINE ESTATES LTD. dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Defendants.

No. 12-2-12968-7

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[PROPOSED]

FILED
DEPT. 2
IN OPEN COURT
NOV - 7 2014
Pierce County Clerk
By DEPUTY



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## Introduction

The parties have presented their evidence in this matter to the Court, without a jury, from September 29, 2014 to October 22, 2014. The undersigned judge presided at trial.

Plaintiff Rolfe Godfrey appeared personally at trial and through his attorneys of record, Kornfeld, Trudell, Bowen & Lingenbrink, Robert B. Kornfeld, Inc., P.S., and Wild Sky Law Group, PLLC. Defendants Ste. Michelle Wine Estates Ltd. ("Ste. Michelle") and Saint-Gobain Containers, Inc. ("Saint-Gobain") appeared through their respective corporate representatives and through their attorneys of record, Corr Cronin Michelson Baumgardner & Preece LLP.

The witnesses who were called by Plaintiff and who testified at trial are identified in the witness list attached hereto as **Exhibit A**.

The exhibits that were offered and admitted into evidence are set out in the exhibit list attached hereto as **Exhibit B**.

The Court has had the opportunity to hear the testimony of the witnesses, to observe the demeanor of each witness, to assess the credibility of each witness, and to determine the weight to be given to the testimony of each witness. Based upon the evidence presented at trial, the Court hereby makes the following findings and conclusions:

## Findings of Fact

***Concerning Jurisdiction***

1. Plaintiff Rolfe Godfrey was a resident of Washington State at all relevant times. Defendants Saint-Gobain and Ste. Michelle transacted business within Washington State at all relevant times. No party contests jurisdiction.

***Procedural History***

2. Mr. Godfrey and his estranged wife, Kirstine Godfrey, filed a Complaint in this matter on September 20, 2012. In the Complaint, Mr. Godfrey asserted numerous common law and strict product liability claims, and Ms. Godfrey asserted claims on her own behalf for loss of



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consortium. At the time of trial, all claims had been dismissed by stipulation of the parties, or by the Court on summary judgment, except for Mr. Godfrey's ~~strict liability~~ claim under the Washington Product Liability Act (WPLA), ch. 7.72 RCW, alleging that a product manufactured by the Defendants was not reasonably safe in construction.

***Background***

3. On February 13, 2010, at approximately 7:30 p.m., a glass wine bottle broke in the hand of Plaintiff Mr. Godfrey while he was opening it with a corkscrew, resulting in a laceration of Mr. Godfrey's left thumb (the "incident"). The top and upper portion of the neck of the bottle broke into pieces that were not ~~preserved by Mr. Godfrey or the Olive Garden.~~ The remainder of the bottle was introduced into evidence at trial. Exhibit 39. Both the cork from the incident bottle and the corkscrew Mr. Godfrey used to open it were likewise not preserved.

4. The incident bottle was manufactured by Defendant Saint-Gobain, and bottled with wine by Defendant Ste. Michelle at its Columbia Crest Winery in Paterson, Washington on August 4, 2009. Following bottling, the incident bottle was sold to non-party Coho Distributing LLC, a beverage distributor, which stored the bottle in its warehouse before transporting it to the Olive Garden on January 28, 2010, where it was stored until the time of the incident.

***Liability***

5. The central disputed issue at trial was what caused the incident bottle to break. Plaintiff argued that the bottle was manufactured out of specification for perpendicularity (or "lean"), which caused it to be damaged during the bottling process, and that this damage later caused the bottle to break while it was being opened by Mr. Godfrey. Defendants argued that the bottle broke because of contact damage from the corkscrew Mr. Godfrey was using when he attempted to open the bottle.

6. Plaintiff called two liability experts at trial, William Hamlin and Eric Heiberg. Mr. Hamlin has worked in the bottling line industry for a number of years, and is knowledgeable about



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bottling lines. He did not, however, offer any testimony concerning what caused the incident bottle to break nor any opinion concerning whether the incident bottle was defective when it left the possession and control of Ste. Michelle.

7. Mr. Heiberg is a professional engineer who has experience in product failure analysis. He has very limited training and experience with glass products, however, and what experience he has is primarily with flat glass, as opposed to container glass. Mr. Heiberg testified that he examined and took measurements of the incident bottle, which he found to be both "out of round," and to have a "rocker bottom." Mr. Heiberg admitted that neither the "out of round" measurement nor the "rocker bottom" measurement he relied upon for the incident bottle exceeded the manufacturer's specifications. He testified, however, that when the two measurements were combined, the net effect was that it was possible for the incident bottle to exceed the manufacturer's specification for perpendicularity, and that, as a result, the bottle could have been damaged during the bottling process on Ste. Michelle's bottling line.

8. The Court does not find Mr. Heiberg's opinion persuasive. First, there was persuasive evidence at trial that significant differences exist between flat glass (Mr. Heiberg's area of prior experience) and container glass (the specialty of defense expert Rick Bayer, discussed below), including the types of stresses that act upon flat and container glasses. Second, Mr. Heiberg's measurement methodology of the incident bottle was not reliable because he did not use accepted industry standards to measure the bottle; instead he measured the bottle while it rested on a wooden conference table, rather than placing it upon a machine-ground metal plate (which was the method employed by Mr. Bayer, who derived different measurements). Third, the Court finds persuasive the testimony by defense experts that, even if Mr. Heiberg's underling measurements were correct, his perpendicularity calculations combining the effects of "out of round" and "rocker bottom" would only be justified in the unlikely event that those two conditions lined up exactly – i.e., that the incident bottle was out of round and had a rocker bottom that each caused it to lean in



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the exact same direction – and that it was ~~much more~~ likely that two such conditions would cancel each other ~~to some degree~~. Fourth, the Court also finds persuasive the testimony of defense experts that a small crack or other defect in the top of the incident bottle that weakened the glass would not have withstood the stress exerted by the cork once it was inserted into the bottle, and that the bottle, under Plaintiff's theory, would therefore have broken long before it reached Mr. Godfrey.

9. Defendants called Rick Bayer, a Glass Technology Specialist with American Glass Research. Mr. Bayer has worked in the glass container industry for his entire 40-year career, and has been conducting glass fracture analyses since 1975. He has conducted in excess of 25,000 glass fracture analyses, and has taught classes and given lectures on glass fracture analysis. Mr. Bayer testified that the remaining portion of the incident bottle exhibited a classic "J" crack fracture pattern. He further testified that this pattern occurs when a corked bottle is fractured at or near the top of the bottle, with the fracture originating within the zone of the circumferential tension stress caused by the cork pressure, that a "J" crack fracture originates and completes itself at the time that the damage giving rise to the fracture occurs. He further testified that he had examined approximately 15-18 other "J" crack fractures in his career and in each case the cause of the fracture had been contact damage with a corkscrew. Mr. Bayer also testified that he examined the surface of the fracture with a microscope, and observed "ripple" marks indicating that the origin of the fracture was on the inside surface of the top of the incident bottle. Mr. Bayer testified that based upon his inspection of the bottle, his knowledge and experience concerning "J" crack fractures, and his observation of the ripple marks, that the bottle broke from contact damage with a corkscrew.

10. The Court finds Mr. Bayer's opinion credible and persuasive. First, Mr. Bayer's analysis concerning the "J" crack fracture pattern and the evidence of ripple marks on the surface of the fracture was uncontroverted by Plaintiff's experts. Second, Mr. Godfrey's testimony concerning the incident supported Mr. Bayer's conclusion that the cause of breakage was contact damage with a ~~corkscrew~~ single lever wine key in several ways. Mr. Godfrey testified that he removed the foil from the top of the



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bottle, and examined it for chips, cracks, or other imperfections before inserting the corkscrew. Mr. Godfrey also testified that he successfully extracted the cork one-third to one-half way out of the bottle before it broke, ~~which shows that the glass in the finish of the bottle was strong at the time of Mr. Godfrey's initial pull with the corkscrew, but then suddenly became weak and broke as he continued extracting the cork~~. Finally, Mr. Godfrey testified that the finish of the bottle broke into a number of small pieces, which Mr. Bayer testified is consistent with a "J" crack fracture pattern.

11. The Court finds that the Plaintiff's evidence ~~was speculative~~, and Plaintiff has not carried his burden to prove, by a preponderance of the evidence, that the incident bottle contained a construction defect at the time it left the control of the Defendants that caused injury to Mr. Godfrey. The Court further finds credible and persuasive the testimony of defense expert Mr. Bayer, who opined that that the incident bottle broke because of contact damage caused by a corkscrew at the moment the bottle broke. Accordingly, based upon the testimony and evidence at trial, the Court finds that the cause of the bottle breakage resulting in Mr. Godfrey's injuries was Mr. Godfrey's own use of a corkscrew in a manner that caused the incident bottle to break.

***Damages***

12. Because the Court finds in favor of Defendants on the issue of liability, the Court does not enter any findings concerning damages.

**Conclusions of Law**

***Jurisdiction***

1. This Court has jurisdiction over this matter because both Defendants transact business in the State of Washington, and jurisdiction is otherwise proper. RCW 4.28.185; *Shute v. Carnival Cruise Lines,* 113 Wash. 2d 763, 783 P.2d 78 (1989). The parties did not contest whether the Court has jurisdiction.

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***In General***

2. Under the Washington Product Liability Act (WPLA), "[a] product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction." RCW 7.72.030. A product is not reasonably safe in construction if, "when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line." RCW 7.72.030(2)(a).

3. In addition, in determining whether a product is reasonably safe, "the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer." RCW 7.72.030(3). In determining the reasonable expectations of the ordinary consumer, the following factors must be considered: "The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue." *Seattle-First Nat'l Bank v. Tabert,* 86 Wn.2d 145, 154, 542 P.2d 774 (1975). The consumer expectations test does not relieve a plaintiff of the necessity of showing "the product is unchanged from the condition in which it was sold and the unusual behavior of the product is not due to any conduct on the part of the plaintiff or anyone else who has a connection with the product." *Pagnotta v. Beall Trailers of Oregon, Inc.,* 99 Wn. App. 28, 991 P.2d 728, 733 (2000); *see also* RCW 7.72.030(2)(a).

4. Case law has held that the consumer-expectations approach is an independent alternative for design defect cases under the WPLA. *Falk v. Keene Corp,* 113 Wn.2d 645, 654, 782 P.2d 974 (1989). No Washington case has held, however, that the consumer expectations approach of RCW 7.72.030(3) is independent from the material deviation approach of RCW 7.72.030(2)(a) in a construction defect case. The consumer expectations test does not appear well-suited to determine



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a construction defect case, as the multi-factor analysis required for application of the test does not lend itself well to determining whether a product contained a construction defect. Accordingly, the Court holds that a claimant under the WPLA may not prove a construction defect only by means of the consumer-expectations approach. As discussed below, however, even if the consumer expectations test is applied in this case, Plaintiff has failed to prove his claim under that theory.

***Construction Defect***

5. Plaintiff's theory of liability in this case is that the incident wine bottle was damaged during the wine bottling process. In support of that theory, Plaintiff put forward the testimony of two experts, William Hamlin and Eric Heiberg. For the reasons set forth above in the Findings of Fact, the opinions of Mr. Hamlin and Mr. Heiberg are not persuasive. In addition, as discussed in the Findings, the Court found that defense expert Rick Bayer's glass fracture analysis was credible and persuasive, and that, on a more probable than not basis, the cause of breakage was contact damage with a corkscrew. Therefore, Plaintiff has not carried his burden of showing, by a preponderance of the evidence, that the incident bottle contained a construction defect that caused him injury.

***Consumer Expectations***

6. In the alternative, Plaintiff argued that the Court should infer the presence of a construction defect under the consumer expectations test by finding that a wine bottle that breaks while being opened does not meet the reasonable expectations of a consumer. Plaintiff argued that the Court need not consider the testimony of his experts, Mr. Hamlin and Mr. Heiberg, and moreover that he need not even present any proof of a construction defect, to prevail under the consumer expectations test. As discussed above, it appears that no Washington case has applied the consumer expectations test to a construction defect WPLA claim, and the Court does not believe it should be so applied for the first time in this case. Even if it did apply, however, the consumer expectations test would not apply in this case. The consumer expectations test may be applied only in certain



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types of cases, "in which there is *no evidence, direct or circumstantial,* available to prove exactly what sort of manufacturing flaw existed, or exactly how the design was deficient." *Pagnotta*, 99 Wn. App. at 733 (emphasis added). Here, however, there was evidence in the form of the remaining part of the incident bottle, and the Court found that Mr. Bayer's glass fracture analysis and conclusions based upon his inspection of the remaining bottle were credible and persuasive.

7. In addition, Plaintiff's position that he need not present any evidence of a construction defect whatsoever, other than the fact of the accident, is not sufficient to carry his burden under the consumer expectations test. *See Bich v. Gen. Elec. Co.*, 27 Wn. App. 25, 31, 614 P.2d 1323, 1327 (1980) ("The mere fact of an accident alone does not establish that a product was defective."); *see also Pagnotta*, 99 Wn. App. at 72 ("[T]he strict liability doctrine does not impose legal responsibility simply because a product causes harm.").

8. Moreover, the consumer expectations test does not relieve Plaintiff of the necessity of showing that "the product is unchanged from the condition in which it was sold and the unusual behavior of the product is not due to any conduct on the part of the plaintiff or anyone else who has a connection with the product." *Pagnotta*, 99 Wn. App. at 28; *see also* RCW 7.72.030(2)(a). As discussed above, the Court found that the cause of the breakage was conduct on the part of Mr. Godfrey himself.

9. Finally, application of the consumer expectations test requires consideration of the *Tabert* factors, and Plaintiff failed to offer necessary evidence on these factors.

10. Regardless of the theory upon which he relies, Plaintiff has failed to prove a construction defect claim under the WPLA.

***Damages***

11. Because Plaintiff has failed to prove his claim, the Court does not reach the issue of damages.



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**ORDER**

The Court declares that Plaintiff has failed to establish the essential elements of a construction defect claim under the WPLA, and therefore finds for Defendants.

DATED this 7th day of NOVEMBER, 2014.

KATHERINE M. STOLZ
SUPERIOR COURT JUDGE

FILED
DEPT. 2
IN OPEN COURT
NOV - 7 2014
Pierce County Clerk
By DEPUTY

Seann GLEAN # 38764
Defendants

Copy received; form disputed
Roxanne Eberle
Roxanne Eberle, WSBA #41273
Plaintiff



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**Exhibit A**

**Testifying Witnesses**

Plaintiff's Witnesses

William Hamlin

C. Stephen Settle, M.D.

Eric Heiberg, P.E.

John Fontaine

Alan Thomas, M.D. (video deposition)

Frederick DeKay

Daniel Hayes

Jason Morgan (deposition transcript)

Caleb Culver (deposition transcript)

Kirstine Godfrey

Rolfe Godfrey

Julie Johnson (deposition transcript)

Defendants' Witnesses

Rick Bayer

Merrill Cohen

Lorraine Barrick

Jim Goldman



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## Exhibit B

**Admitted Exhibits**

| Ex. # | Description |
|---|---|
| 1 | Medical & Billing Records of Multicare |
| 2 | Medical & Billing Records of MVP Physical Therapy |
| 3 | Medical & Billing Records of Puget Sound Orthopedics |
| 4 | Medical & Billing Records of Dr. Stephen Settle (ERAT) |
| 5 | Medical & Billing Records of Tacoma Orthopedic Surgeons |
| 6 | Medical & Billing Records of Seattle Hand Surgery Group |
| 7 | Medical & Billing Records of St. Clare Hospital |
| 8 | Medical & Billing Records of Amy Hanson |
| 9 | Medical & Billing Records of Blue Moon Healing |
| 10 | Medical & Billing Records of Right Touch Therapy |
| 11 | Billing Records of Bartell Drugs |
| 12 | Billing Records of Walgreens |
| 15A | Pick Sheet & Remittance –excerpt from Darden |
| 16 | Documents Produced by H&R Block |
| 19 | Godfrey Return to Work Offer from Olive Garden |
| 20 | Godfrey Tax Returns 2006-2011 |
| 24A | Plaintiff's Summary of Medical Specials w/backup |
| 29A | Fred DeKay Earnings History Table for Rolfe Godfrey **(illustrative purposes only)** |
| 29B | Fred DeKay Summary of Calculations of Economic Loss for Rolfe Godfrey **(illustrative purposes only)** |
| 29C | Fred DeKay Present Value of Life Care Plan Costs for Rolfe Godfrey **(illustrative purposes only)** |



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| Ex. # | Description |
|---|---|
| 31 | Defendants' Answers to Plaintiff's 7th Set of Interrogatories |
| 32 | Defendants' Answers to Plaintiff's 3rd Set of Interrogatories |
| 39 | Subject Bottle |
| 40 | ProLaser Report |
| 41 | Chart by Witness William Hamlin **(illustrative purposes only)** |
| 42 | Photos of Rolfe Godfrey |
| 49 | Pre-Post Corks |
| 49A | Photos of Pre-Post Corks |
| 53 | Chart by Witness William Hamlin **(illustrative purposes only)** |
| 55 | Empty Wine Bottle **(illustrative purposes only)** |
| 56 | Chart Diagram by Witness Eric Heiberg **(illustrative purposes only)** |
| 57A | Video Deposition of Alan Thomas, MD (Part 1 of 2 unedited) |
| 57B | Video Deposition of Alan Thomas, MD (Part 2 of 2 unedited) |
| 57C | Video Deposition of Alan Thomas, MD (edited version on flash drive) |
| 58 | Photos of Rolfe Godfrey post first surgery |
| 59 | Photos of Rolfe Godfrey post second surgery |
| 60 | Photos of Rolfe Godfrey post third surgery |
| 61 | Photos of Rolfe Godfrey illustrating complex regional pain syndrome |
| 62 | Photo of Rick Bayer's equipment |
| 63 | Photo of Rick Bayer's equipment |
| 66 | Photo of Rick Bayer's equipment |
| 67 | Photo of Rick Bayer's equipment |
| 505 | Photographs and Drawings attached to 1/13/14 Bayer Report **(illustrative purposes only)** |



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| Ex. # | Description |
|---|---|
| 505A | Post Board of DEX 505 drawings **(illustrative purposes only)** |
| 507 | Digital Photographs (Bayer Dep Exh 22) |
| 516 | Verallia Product Specifications |
| 517 | Bottle Diagram |
| 543 | Olive Garden Employee Roster (Godfrey Dep Ex 2, Darden 000033-36) |
| 544 | Time Records (Godfrey Dep Exh. 11, Darden 000814) |
| 546 | Summary of H&R Block Earning 2006-2013 (Godfrey Dep Exh. 12) |
| 546A | Summary of H&R Block Earning 2006-2013 (Godfrey Dep Exh. 12) with annotations **(illustrative purposes only)** |
| 550 | Spreadsheet – Data Used in Claim Preparation **(illustrative purposes only)** |
| 551 | Spreadsheet – Historical Earnings **(illustrative purposes only)** |
| 552 | Spreadsheet – Historical New Discount Rate – Employment Compensation **(illustrative purposes only)** |
| 553 | Spreadsheet – Loss of Earnings Assuming Mr. Godfrey is Able to Return to Full Time Work **(illustrative purposes only)** |
| 554 | Spreadsheet – Cost of Future Life Care Plan **(illustrative purposes only)** |
| 554A | Spreadsheet – Cost of Future Life Care Plan **(illustrative purposes only)** |
| 558 | Bookkeeping, Accounting and Audit Clerks Job Posting **(illustrative purposes only)** |
| 566 | Chart – Past Wage Loss, Future Wage Loss, Retraining LCP **(illustrative purposes only)** |
| 568 | Handwritten Letter from Kirstine Godfrey dated 12/21/12 |
| 569 | Accident Report Form |
| 570 | Printout from H&R Block Listing Job Tasks List of Plaintiff |
| 571 | Printout of Darden Information re Plaintiff's Paystubs |
| 572 | Summary of Rolfe Godfrey's Hours from 2009 Darden Earning Statements **(illustrative purposes only)** |
| 574 | Photograph of Ripple Mark **(illustrative purposes only)** |



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Fax (206) 625-0900

| Ex. # | Description |
|---|---|
| 575 | Photograph of Internal Pressure Break Pattern **(illustrative purposes only)** |
| 576 | Photograph of Contract Damage **(illustrative purposes only)** |
| 577 | Photograph of a "J" Crack **(illustrative purposes only)** |
| 578 | Unopened Bottle of Ste Michelle Riesling **(illustrative purposes only)** |
| 579 | Single Lever Corkscrew Bottle Opener **(illustrative purposes only)** |
| 580 | Blank Piece of Lined Paper **(illustrative purposes only)** |
| 583 | Flash Drive of Optical Comparator Video Excerpt |
| 584 | Centering Cone **(illustrative purposes only)** |
| 586 | Olive Garden Timesheet Clock In/Out |
| 612 | Dr. Alan Thomas Medical Records |
| 613 | Letter from L. Phillips to Dr. Alan Thomas dated 7/9/2010 re Job Analysis |
| 614 | Letter from Dr. William Wagner to Dr. Alan Thomas dated 8/23/2011 |
| 615 | Letter from Case Manager (Helmsman Management Services LLC) to Dr. Alan Thomas dated 10/28/2011 |



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23947 6/12/2013 740177

12-2-12968-7 40683360 ORACS 06-12-13

**STATE OF WASHINGTON**
**E COUNTY**

FILED
DEPT. 10
IN OPEN COURT
JUN - 7 2013
Pierce County Clerk
By DEPUTY

No. 12-2-12968-7

**ORDER AMENDING CASE SCHEDULE**

ROLFE GODFREY

Plaintiff(s)

vs

STE MICHELLE WINE ESTATES LTD

Defendant(s)

Type of Case: TTO
Estimated Trial (days): 5
Track Assignment: Complex
Assigned Department: 10 - Judge GAROLD E. JOHNSON
Docket Code: ORACS

| | |
|---|---|
| Plaintiff's/Petitioner's Disclosure of Primary Witnesses | 12/02/13 |
| Defendant's/Respondent's Disclosure of Primary Witnesses | 01/06/14 |
| Disclosure of Rebuttal Witnesses | 02/10/14 |
| Deadline for Filing Motion to Adjust Trial Date | 03/10/14 |
| Discovery Cutoff | 04/21/14 |
| Exchange of Witness and Exhibit Lists and Documentary Exhibits | 05/12/14 |
| Deadline for Hearing Dispositive Pretrial Motions | 05/26/14 |
| Deadline to file Certificate or Declaration re: Alternative Dispute Resolution (PCLR 16 (c)(3) | 05/26/14 |
| Joint Statement of Evidence | 05/26/14 |
| Pretrial Conference (Contact Court for Specific Date) | Week Of 06/16/14 |
| Trial | 07/07/14 9 00 |

**Unless otherwise instructed, ALL Attorneys/Parties shall report to the trial court at 9:00 AM on the date of trial.**

**NOTICE TO PLAINTIFF/PETITIONER**

If the case has been filed, the plaintiff shall serve a copy of the Case Schedule on the defendant(s) with the summons and complaint/petition. Provided that in those cases where service is by publication the plaintiff shall serve the Case Schedule within five (5) court days of service of the defendant's first response/appearance If the case has not been filed, but an initial pleading is served, the Case Schedule shall be served within five (5) court days of filing See PCLR 3

**NOTICE TO ALL PARTIES**

All attorneys and parties shall make themselves familiar with the Pierce County Local Rules, particularly those relating to case scheduling Compliance with the scheduling rules is mandatory and failure to comply shall result in sanctions appropriate to the violation. If a statement of arbitrability is filed, PCLR 3 does not apply while the case is in arbitration

DATED 6/7/13

Judge Garold E Johnson
Department 10 (253) 798-7572

APP B

# IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
# IN AND FOR PIERCE COUNTY

ROLFE GODFREY

Plaintiff(s)

vs

STE MICHELLE WINE ESTATES LTD

Defendant(s)

No. 12-2-12968-7

**ORDER AMENDING CASE SCHEDULE**

| | |
|---|---|
| Type of Case | TTO |
| Estimated Trial (days) | 5 |
| Track Assignment | Complex |
| Assigned Department | 10 - Judge GAROLD E JOHNSON |
| Docket Code | ORACS |

CC: Austin M. Rainwater, Atty
Emily J Harris, Atty
Mack Harrison Shultz Jr, Atty
ROBERT B. KORNFELD, Atty



APP B

## RCW 2.24.040

## Powers — Fees.

Such court commissioner shall have power, authority, and jurisdiction, concurrent with the superior court and the judge thereof, in the following particulars:

(1) To hear and determine all matters in probate, to make and issue all proper orders therein, and to issue citations in all cases where same are authorized by the probate statutes of this state.

(2) To grant and enter defaults and enter judgment thereon.

(3) To issue temporary restraining orders and temporary injunctions, and to fix and approve bonds thereon.

(4) To act as referee in all matters and actions referred to him or her by the superior court as such, with all the powers now conferred upon referees by law.

(5) To hear and determine all proceedings supplemental to execution, with all the powers conferred upon the judge of the superior court in such matters.

(6) To hear and determine all petitions for the adoption of children and for the dissolution of incorporations.

(7) To hear and determine all applications for the commitment of any person to the hospital for the insane, with all the powers of the superior court in such matters: PROVIDED, That in cases where a jury is demanded, same shall be referred to the superior court for trial.

(8) To hear and determine all complaints for the commitments of minors with all powers conferred upon the superior court in such matters.

(9) To hear and determine ex parte and uncontested civil matters of any nature.

(10) To grant adjournments, administer oaths, preserve order, compel attendance of witnesses, and to punish for contempts in the refusal to obey or the neglect of the court commissioner's lawful orders made in any matter before the court commissioner as fully as the judge of the superior court.

(11) To take acknowledgments and proofs of deeds, mortgages and all other instruments requiring acknowledgment under the laws of this state, and to take affidavits and depositions in all cases.

(12) To provide an official seal, upon which shall be engraved the words "Court Commissioner," and the name of the county for which he or she may be appointed, and to authenticate his official acts therewith in all cases where same is necessary.

(13) To charge and collect, for his or her own use, the same fees for the official performance of official acts mentioned in subsections (4) and (11) of this section as are provided by law for referees and notaries public.

(14) To hear and determine small claims appeals as provided in chapter 12.36 RCW.

(15) In adult criminal cases, to preside over arraignments, preliminary appearances, initial extradition hearings, and noncompliance proceedings pursuant to RCW 9.94A.6333 or 9.94B.040; accept pleas if authorized by local court rules; appoint counsel; make determinations of probable cause; set, amend, and review conditions of pretrial release; set bail; set trial and hearing dates; authorize continuances; and accept waivers of the right to speedy trial.

[2009 c 28 § 1; 2000 c 73 § 1; 1997 c 352 § 14; 1991 c 33 § 6; 1979 ex.s. c 54 § 2; 1963 c 188 § 1; 1909 c 124 § 2; RRS § 85. Prior: 1895 c 83 § 2.]

## RCW 2.24.050

## Revision by court.

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

[1988 c 202 § 1; 1971 c 81 § 10; 1909 c 124 § 3; RRS § 86.]

## RCW 4.12.050

## Affidavit of prejudice.

(1) Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

(2) This section does not apply to water right adjudications filed under chapter 90.03 or 90.44 RCW. Disqualification of judges in water right adjudications is governed by RCW 90.03.620.

[2009 c 332 § 20; 1941 c 148 § 1; 1927 c 145 § 2; 1911 c 121 § 2; Rem. Supp. 1941 § 209-2.]

# CR 35 PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Examination.

(1) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(2) Representative at Examination. The party being examined may have a representative present at the examination, who may observe but not interfere with or obstruct the examination.

(3) Recording of Examination. Unless otherwise ordered by the court, the party being examined or that party's representative may make an audiotape recording of the examination which shall be made in an unobtrusive manner. A videotape recording of the examination may be made on agreement of the parties or by order of the court.

(b) Report of Examining Physician or Psychologist. The party causing the examination to be made shall deliver to the party or person examined a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. The report shall be delivered within 45 days of the examination and in no event less than 30 days prior to trial. These deadlines may be altered by agreement of the parties or by order of the court. If a physician or psychologist fails or refuses to make a report in compliance herewith the court shall exclude the examiner's testimony if offered at the trial, unless good cause for noncompliance is shown.

(c) Examination by Agreement. Subsections (a) (2) and (3) and (b) apply to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

# CR 60 RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability

ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

[Amended effective September 26, 1972; January 1, 1977; April 28, 2015.]

# ■ CIVIL RULES - PCLR

**PCLR 3 COMMENCEMENT OF ACTION/CASE SCHEDULE**

**(a) Scope**. This rule shall apply to all civil cases including family law cases once an **Order Setting Case Schedule** as set forth in Appendix, **Form A** has been issued pursuant to **PCLR 40(d)**, except for:

**(1)** Cases in mandatory arbitration after they have been transferred to arbitration pursuant to **PCLMAR 2.1**. A written request for a trial de novo shall cause a new Order Setting Case Schedule to be issued by the assigned judicial department when the request for trial de novo is filed pursuant to **PCLMAR 7.1**;

**(2)** Change of name;

**(3)** Adoption;

**(4)** Domestic violence (**Chapter 26.50 RCW**);

**(5)** Harassment (**Chapter 10.14 RCW**);

**(6)** UIFSA actions (**Chapter 26.21A**);

**(7)** Review of action taken by administrative agency, except Land Use Petition Actions (LUPA) filed pursuant to **Ch. 36.70C RCW**, which shall be assigned a Case Schedule pursuant to (g) below;

**(8)** Appeals from courts of limited jurisdiction, except de novo appeals from courts of limited jurisdiction which shall be assigned an Order Setting Case Schedule by the assigned judicial department when filed;

**(9)** Foreign judgments;

**(10)** Abstract or transcript of judgment;

**(11)** Civil commitment;

**(12)** Proceedings under **Chapter 10.77 RCW** (Criminally Insane);

**(13)** Proceedings under **Chapter 70.96A RCW**;

**(14)** The following case types for which the Clerk shall issue, at the time of filing or when an order appointing personal representative is filed, an Order Assigning Case to Judicial Department and Setting Hearing Date as indicated:

**(A)** Case types to be reviewed 4 months after filing:

Absentee
Administrative Law Review
Confidential name change
Collection
Commercial
Compel/Confirm Binding Arbitration
Confidential Intermediary
Deposit of Surplus Funds
DOL Revocation – Appeal
Foreclosure
Guardianship, Limited Guardianship, Special Needs Trust and Trust, except for annual periodic reviews of guardianships and trusts which are heard by the assigned Judicial Department on its Friday motion docket, and contested guardianships which shall be assigned a Case Schedule when a trial date is requested;
Injunction
Interpleader
Lower Court Appeal – Civil
Lower Court Appeal – Infraction
Minor Settlement with or without guardianship
Miscellaneous
Petition for Writ
Proceedings for isolation and quarantine
Seizure of Property from Commission of Crime
Seizure of Property Resulting from Crime
Subpoenas
Unlawful Detainer
Writ of Habeas Corpus
Writ of Mandamus
Writ of Review

**(B)** Case types to be reviewed 6 months after filing:

Criminal RALJ Appeal

**(C)** Case types to be reviewed 12 months after filing:

Adoption

Child Support or Maintenance Modifications

Estate/probate if court supervision is required (e.g. bond required, either a guardian or guardian ad litem is appointed to represent a minor or incompetent heir, or estate insolvent) or is otherwise governed by **RCW 11.76.010**, except any will contest or litigation matter arising in a probate case shall be assigned an Order Setting Case Schedule when the Petition to Contest the Will is filed or the estate is sued.

Paternity Parent Determination

Trust and Estate Dispute Resolution Act (TEDRA)

**(D)** Case types to be reviewed 60 months after filing:

Estate/probate if full nonintervention powers are granted.

The purpose of the hearing in these cases shall be to assess the progress of the case and assure that the matter is being prosecuted diligently to a conclusion. If necessary, a trial date may be assigned. Failure to attend the hearing may result, when appropriate, in dismissal of the case without prejudice or closure of the matter without further notice. In paternity matters, it may result in a resolution of the case without dismissal.

**(b) Case Schedule**. When a new civil case is filed or as otherwise provided in these rules, the clerk shall issue and file a document entitled Order Setting Case Schedule or an Order Assigning Case to Judicial Department and Setting a Hearing date, as applicable, and shall provide one copy to the plaintiff/petitioner and one copy to the assigned judicial department. The plaintiff/petitioner shall serve a copy of the applicable Order on the defendant/respondent along with the initial pleadings; provided that if the initial pleading is served prior to filing, the plaintiff/petitioner shall within five (5) court days of filing serve the applicable Order. If the initial pleading is served by publication, the plaintiff/petitioner shall serve the applicable Order within five (5) court days of service of defendant's/respondent's first appearance. When the applicable Order is served pursuant to this section, it may be served by regular mail with proof of mailing/service to be filed promptly in the form required by these rules, see **PCLR 5**. The **Order Setting Case Schedule** shall contain the case heading and otherwise be as set forth in Appendix, **Form A**, except for estate/probate cases for which the Order Setting Case Schedule shall be in a form set forth in Appendix, **Form B (1)** or **B (2)**, depending on the time period for mandatory case review.

**(c) Family Law Cases.** When a new family law case is filed, the clerk shall issue and file a document entitled Order Assigning Case to Judicial Department and shall provide one copy to the petitioner and one copy to the assigned judicial department. Nonparental Custody Petitions and Petitions to Modify Parenting Plan shall be issued an Order Setting Case Schedule at filing pursuant to **PCLSPR 94.04(f)** and **(g)**. The respondent shall be served with the applicable Order as set forth in **PCLR 3(b)**. The **Order Assigning**

Case to Judicial Department shall contain the case heading and otherwise be as set forth in Appendix, Form I.

**(d) Amendment of Case Schedule.** The court, either on motion of a party or on its own initiative, may modify any date in the Order Setting Case Schedule for good cause, including the track to which the case is assigned, except that the trial date may be changed only as provided in **PCLR 40(g)**. If an Order Setting Case Schedule is modified or the track assignment is changed, the court shall prepare and file the Order Amending Case Schedule and promptly mail or provide it to the attorneys and self-represented parties.

**(e) Service on Additional Parties Upon Joinder.** A party who joins an additional party in an action shall be responsible for serving the additional party with the current Order Setting Case Schedule together with the first pleading served on the additional party.

**(f) Form of Case Schedule.**

**(1) Original Case Schedule.** The **Order Setting Case Schedule** is set forth in Appendix, **Form A.**

**(2) Amended Case Schedule.** An Order Amending Case Schedule shall be in the same form as the original Order Setting Case Schedule; except that an Order Amending Case Schedule shall be entitled Order Amending Case Schedule and it need not include the Notice provisions. An Order Amending Case Schedule issued pursuant to **PCLR 40(e)(4)** shall only contain the following dates: Joint Statement of Evidence, Pretrial Conference and Trial date. Additional dates may be added to the Order Amending Case Schedule upon order of the court.

**(g) Time Intervals.** Except for those cases provided for in **PCLR 3(a)(1)**, **(8)**, **(9)** and **(12)** the events and time intervals included in the original Order Setting Case Schedule shall be measured in weeks from the date of filing or assignment of a Case Schedule as follows:

**CASE SCHEDULE AND TRACK ASSIGNMENT-Measured in Weeks:**

| | EXPEDITED | STANDARD | COMPLEX | DISSOLUTION |
|---|---|---|---|---|
| Confirmation of Service | 2 | 4 | 6 | 3 |
| Confirmation of Joinder of Parties, Claims and Defenses * | 8 | 17 | 26 | |
| Jury Demand * | 9 | 18 | 27 | |
| Set Settlement Conference Date with Assigned Judicial Officer | | | | 14 |
| Status Conference **(contact court for specific date)** | 10 | 21 | 32 | 14 |

| | EXPEDITED | STANDARD | COMPLEX | DISSOLUTION |
|---|---|---|---|---|
| Plaintiff's/Petitioner's Disclosure of Primary Witnesses | 12 | 25 | 38 | 18 |
| Defendant's/Respondent's Disclosure of Primary Witnesses | 15 | 29 | 42 | 21 |
| Disclosure of Rebuttal Witnesses | 17 | 36 | 57 | 23 |
| Deadline for filing motion to Adjust Trial Date | 19 | 40 | 60 | 25 |
| Discovery Cutoff | 20 | 45 | 67 | 30 |
| Exchange of Witness and Exhibit Lists and Documentary Exhibits | 21 | 47 | 70 | 32 |
| Deadline for Hearing Dispositive Pretrial Motions * | 22 | 48 | 72 | |
| Joint Statement of Evidence | 22 | 48 | 72 | 32 |
| Alternative Dispute Resolution to be held before | 23 | 48 | 72 | |
| Settlement Conference to be held before | | | | 34 |
| Pretrial Conference **(contact Court for specific date)** | 25 | 50 | 75 | 35 |
| Trial | 26 | 52 | 78 | 36 |

* Does not apply to dissolution cases.

**LUPA CASE SCHEDULE:**

| **CASE EVENT** | **DEADLINE** |
|---|---|
| Petition for Review of Land Use Decision Filed and Schedule Issued (**RCW 36.70C.040**) | |
| DEADLINE to contact assigned Judge to confirm Initial hearing (**RCW 36.70C.080**) | 7 days after Petition is filed |
| DEADLINE to Stipulate or File Motion for Change of Hearing Date or Adjustment of Schedule (**RCW 36.70C.080(1)**; **RCW 36.70C.090**) | 28 days after Petition is filed |
| Initial Hearing on Jurisdictional and Preliminary Matters (FRIDAYS ONLY) (**RCW 36.70C.080**) | 40 days after Petition is filed |

| | |
|---|---|
| DEADLINE to file Certified Copy of Local Jurisdiction Record (RCW 36.70C.110) | 45 days after Initial Hearing |
| DEADLINE to file Brief of Petitioner (RCW 36.70C.080(4)) | 20 days after deadline to file Record |
| DEADLINE to file Brief of Respondent (RCW 36.70C.080(4)) | 40 days after deadline to file Record |
| DEADLINE to file Reply Briefs (RCW 36.70C.080(4)) | 50 days after deadline to file Record |
| Review Hearing/Trial Date – (RCW 36.70C.090) | Within 60 days of the date set for submitting the Record |

**(h) Track Assignment.**

**(1) Track Assignment.** Each case shall be assigned to a track as set forth in this rule.

**(2) Expedited Cases.** Expedited cases shall have a discovery cutoff of 20 weeks and trial in 26 weeks. There shall be depositions of the parties only without leave of court. Interrogatories shall be limited to twenty-five (25) in number and each subpart of an interrogatory shall be counted as a separate interrogatory for purposes of this rule. There shall be no limit on requests for admissions. Any case in which it is expected there will be no more than a total of four (4) witnesses shall be presumptively an expedited track case.

**(3) Standard Cases.** Standard cases shall have a discovery cutoff of 45 weeks and trial in 52 weeks. There shall be no limitations with respect to depositions, except as otherwise ordered pursuant to the state civil rules. Interrogatories shall be limited to thirty-five (35) in number and each subpart of an interrogatory shall be counted as a separate interrogatory for purposes of this rule. There shall be no limit on requests for admissions. Actions for breach of contract, personal injury, title to land, construction claims involving questions of workmanship and discrimination claims shall presumptively be standard track cases. Any case wherein it is expected there will be no more than a total of twelve (12) witnesses shall be presumptively a standard track case.

**(4) Complex Cases.** Complex cases shall have a discovery cutoff of 67 weeks and trial in 78 weeks. There shall be no limitations with respect to depositions, except as otherwise ordered pursuant to the state civil rules. Interrogatories shall be limited to thirty-five (35) in number and each subpart of an interrogatory shall be counted as a separate interrogatory for purposes of this rule. There shall be no limit on requests for admission. Medical or professional malpractice, product liability and class action claims shall presumptively be complex track cases.

**(5) Dissolution Cases.** All dissolutions shall presumptively be a family law track at filing. If not resolved within 122 days of filing, the case will be assigned to the dissolution track by the assigned Judicial Department and an Order Setting Case Schedule will be created. There shall be no limitations with respect to depositions except as otherwise ordered pursuant to the civil rules. Interrogatories shall be limited to one hundred (100) in number and each subpart of an interrogatory shall be counted as a separate interrogatory for purposes of this rule. There shall be no limit on requests for admissions.

**(6) LUPA Cases.** All LUPA cases shall be LUPA track cases.

**(7) Collaborative Law Cases**. In the event that represented parties mutually agree to participate in Collaborative Law, they shall present to the assigned judicial department the Order and Joint Notice of Participation in Collaborative Law as set forth in the Appendix, **Form P**, and obtain a mandatory status conference date. The parties shall no longer have to comply with the Order Setting Case Schedule Requirements of **PCLR 3**. If the case does not resolve by the mandatory status conference date, the mandatory status conference shall be held to advise the Court of the progress. Counsel and the court may agree to continue the status conference if participation in the Collaborative Law process is ongoing. Failure to comply may lead to dismissal of the case.

**(i) Trial by Affidavit**.

**(1) Affidavit.** Parties may agree to submit unresolved issues to the assigned judicial department by affidavit. This shall be determined at the discretion of the assigned judicial department at the status conference or as determined by agreement of the parties and approval of the assigned judicial department. If the request for trial by affidavit is granted the self-represented parties or their attorneys shall file and serve a form entitled **Trial By Affidavit Certificate**, as set forth in Appendix, **Form C**. The assigned judicial department shall issue an Order Amending Case Schedule.

**(2) Trial and Notice.** If the matter is to be submitted on affidavit, the parties shall be given a trial date approximately 20 weeks from filing. Fourteen (14) days prior to the trial date the parties shall serve and file their affidavits. Rebuttal affidavits, if any, shall be served and filed no later than seven (7) days prior to trial. Surrebuttal affidavits, if any, shall be filed and served two (2) days before the trial. Working copies of all affidavits shall be provided to the assigned judicial department. Affidavits filed beyond these deadlines shall not be considered.

**(3) Priority.** Matters set for trial by affidavit may take priority over other matters set for the same day. On the day of trial, unless otherwise ordered, each side shall have one-half hour to argue their respective positions to the court.

**(4) Case Schedule.** Once a matter is set for trial by affidavit, the self-represented parties and attorneys shall no longer be bound by the Order Setting Case Schedule, except for the new trial date in the Order Amending Case Schedule issued by the Judicial Assistant.

**(j) Monitoring**. Each judicial department of the Superior Court, the Superior Court Administrator's Office, and at such time as the Presiding Judge may direct, the Clerk of the Court shall monitor cases to determine compliance with these rules.

**(k) Enforcement**. The assigned judicial department, on its own initiative or on motion of a party, may impose sanctions or terms for failure to comply with the Order Setting Case Schedule established by these rules. If the court finds that an attorney or self-represented party has failed to comply with the Order Setting Case Schedule and has no reasonable excuse, the court may order the attorney or party to pay monetary sanctions to the court, or terms to any other party who has incurred expense as a result of the failure to comply, or both; in addition, the court may impose such other sanctions as justice requires. As used in this rule, "terms" means costs, attorney fees, and other expenses incurred or to be incurred as a

result of the failure to comply; the term "monetary sanctions" means a financial penalty payable to the court; the term "other sanctions" includes but is not limited to the exclusion of evidence.

[Amended effective September 1, 2015]

# PCLR 16 PRETRIAL AND SETTLEMENT PROCEDURES

(a) Designated Judge. Except in the case of family law matters or unless otherwise provided for herein, the judicial department to whom the case is assigned at the time of filing shall hear all pretrial matters.

(b) Pretrial Procedure.

(1) Pretrial Conferences. The lead trial attorney of each party represented by an attorney and each self-represented party shall attend the pretrial conference. The conference shall include those matters set forth in CR 16 as well as any other matters that might result in a speedy, just and economical resolution of the case.

(2) Exchange of Exhibit and Witness Lists. In cases governed by an Order Setting Case Schedule pursuant to PCLR 3, the parties shall exchange:

(A) lists of the witnesses whom each party expects to call at trial;

(B) lists of the exhibits that each party expects to offer at trial, except for exhibits to be used only for impeachment; and

(C) copies of all documentary exhibits except for those items agreed to by counsel and self-represented parties, such as identical copies of items already produced to avoid unnecessary duplication. Counsel and self-represented parties are encouraged to ascertain that each has full and complete copies of any document to be presented at trial to avoid unnecessary duplication expenses. In addition, non-documentary exhibits shall be made available for inspection by all other parties no later than fourteen (14) days before trial. Any witness or exhibit not listed shall not be used at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires.

(3) Pretrial Motions. All such motions shall be served, filed and heard pursuant to PCLR 7; provided that no pretrial dispositive motions shall be heard after the cutoff date provided in the Order Setting Case Schedule except by order of the court and for good cause shown.

(4) Joint Statement of Evidence. In cases governed by an Order Setting Case Schedule pursuant to PCLR 3 the parties shall file a Joint Statement of Evidence containing (A) a list of the witnesses whom each party expects to call at trial and (B) a list of the exhibits that each party expects to offer at trial. The Joint Statement of Evidence shall contain a notation for each exhibit as to whether all parties agrees as to the exhibit's authenticity and admissibility.

(c) Alternative Dispute Resolution. Some form of Alternative Dispute Resolution ("ADR") is required in all cases prior to trial except as noted otherwise below.

(1) Non-Family Law Cases. At least 30 days prior to trial the parties shall each submit a certification or declaration that they have participated in one or more types of Alternative

Dispute Resolution, including, but not limited to: formal negotiations that included an exchange of written proposals; arbitration; or mediation.

(2) Family Law Cases. Judicial Officers shall make themselves available for settlement conferences in dissolutions, paternity cases involving petition/motion for establishment of residential schedule or parenting plan, post-dissolution petitions for modification of custody and related Family Law matters, except in Non-Parental Custody Petitions under RCW 26.10, which are exempt from mandatory ADR unless ordered by the Assigned Judge. The attorney or self-represented party may utilize an alternative dispute resolution process to satisfy the settlement conference requirement.

(A) Scheduling and Submission of Materials. A settlement conference Judicial Officer shall be randomly assigned by the LINX computer program at the time the family law case is filed. The parties shall conduct any settlement conference no later than the date set forth in the Case Schedule. The assigned settlement conference Judicial Officer's judicial assistant shall schedule the exact date and time of the settlement conference. If the assigned settlement conference Judicial Officer is not available to conduct the settlement conference before the trial date the attorneys or self-represented parties shall utilize an alternative dispute resolution process to satisfy the settlement conference requirement. The attorney or self-represented party shall prepare a Domestic Relations Information Form and submit the same to the settlement Judicial Officer and opposing counsel or opposing self-represented party not later than two (2) court days prior to the conference. See Appendix, Form E. A fax or email transmittal of working copies shall not be acceptable delivery. This form may be supplemented.

(B) Attendance. Parties shall attend the settlement conference. Attendance may be excused, in advance, by the settlement judicial officer for good cause. Failure to attend may result in the imposition of terms and sanctions as the judicial officer deems appropriate.

(C) Proceedings Privileged. Proceedings of the settlement conferences shall, in all respects, be privileged and not reported or recorded. Without disclosing any communications made at the settlement conference, the settlement conference Judicial Officer may advise the assigned judicial department in writing as to whether the use of further or alternative dispute resolution procedures, or the appointment of additional investigators or the development of additional evidence would be advisable prior to trial.

(D) Settlement of Case. When a settlement has been reached, the settlement agreement or partial agreement shall be placed on the record or reduced to writing. (E) Disqualification. A Judicial Officer presiding over a settlement conference shall be disqualified from acting as the trial Judge in that matter, unless all parties agree in writing.

(F) Withdrawal of Attorney. If any attorney withdraws and a settlement conference has been scheduled or is required to be scheduled by the existing case schedule, the withdrawing attorney shall inform his/her client of the date, time and location of the settlement conference, as well as a brief explanation of the process, including how to schedule a settlement conference and expectations.

(G) Waivers of ADR in Family Law Matters for DV, Child Abuse or other Good Cause. Upon motion and approval of the Assigned Judge [not the settlement conference judge], ADR, including settlement conferences, may be waived in Family Law cases involving domestic violence and/or child abuse or for other good cause shown:

(i) Where a Domestic Violence Restraining Order or Protection Order (excluding Ex-Parte orders) involving the parties has been entered by a court at any time within the previous twelve (12) months; or

(ii) Where a Domestic Violence or other No Contact order involving the parties exists pursuant to RCW 10.99, or has been in effect within the past twelve (12) months; or

(iii) Where the court upon motion finds that allegations of domestic violence or other abuse between the parties are such that it would not be appropriate to mandate alternative dispute resolution; or

(iv) Where the court upon motion finds that allegations of child abuse involving at least one of the parties are such that it would not be appropriate to mandate alternative dispute resolution; or (v) For other good cause shown.

Motions for Waivers of ADR in Family Law must be brought in accordance with the provisions of PCLR 7. The Motion to Waive Mandatory Settlement Conference shall contain the case heading and otherwise be as set forth in Appendix, Form R.

(3) Cases Exempt from Alternative Dispute Resolution. The following cases are exempt from participating in an alternative dispute resolution process: LUPA, RALJ, ALR, child support cases, NonParental Custody Petitions under RCW 26.10, trials de novo after arbitration and family law cases in which a waiver was granted pursuant to PCLR 16(c)(2)(G). Although settlement conferences are not mandatory for Non-Parental Custody Petitions brought under RCW 26.10, any party may request a settlement conference or other form of ADR by motion to the Assigned Judge.

[Amended effective September 1, 2014]

# ER 703 BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[Amended effective September 1, 1992.]

# MASTERS LAW GROUP

## October 01, 2015 - 11:58 AM

**Transmittal Letter**

Document Uploaded: 4-469634-Respondent's Brief~2.pdf

Case Name: Godfrey v. Ste. Michelle
Court of Appeals Case Number: 46963-4

**Is this a Personal Restraint Petition?** Yes ■ No

## The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

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